

September 23, 2009

General Services Administration
Regulatory Secretariat (VPR)
1800 F Street, N.W., Room 4041
ATTN: Hada Flowers
Washington, D.C. 20405

Re: FAR Case 2008-011; Government Property

Dear Ms. Flowers:

I would like to thank you for the opportunity to comment on the proposed rule announced on August 6, 2009 to amend the use of government property in possession of federal contractors under the Federal Acquisition Regulation (FAR).

My concern lies with proposed rule 15.404-4. The new regulation would prevent a contractor from profiting on the cost of contractor acquired property; the rational being that the contractor already receives a benefit by being able to retain the property post-contract and that if the contractor retains title to the property it will not charge rent. It has not been established, however, what type, if any, benefit the contractor receives from keeping the property. It has also not been established that the benefit outweighs the costs that the contractor must incur to keep the property intact and operating, as well as the costs associated with storing and performing yearly accounting. Moreover, the property, such as special tooling and special test equipment, may not benefit the contractor at all if it becomes obsolete after the completion of the contract.

Regardless of any benefit received by the contractor, being equitable does not mean preventing profit. Zero profit fails to account for the contractor incurred risks in acquiring the property and in the effort to purchase the property, just like in any other part of the contract. Further, having these no profit items would create an accounting nightmare. There will be defective pricing issues, required auditing to ensure the zero profit, and a variety of other burdens that are really unnecessary.

A better approach would be for the contracting officer to take the value of the contractor acquired property in consideration when negotiating profits. To do this would only require that the contractor set out the value of these assets and address the value in the proposal.

Additionally, the weighted guidelines could be changed to include a section to address the value of contractor acquired property. Then, the profit range could encompass positive, negative, or neutral profits depending on the value to the contractor. This would take into account that the retention of the contractor acquired property can be a burden to the contractor. Implementing this change in the weighted guidelines would reduce the hassle associated with this provision by simply rolling it up into the total profit.

Thought should also be given to the relationship of the contractor acquired property to the total value of the contract. If the contractor acquired property is less than 1% of the contract value, then the requirement for addressing the value should be eliminated.

Thank you again for this opportunity to comment on FAR Case 2008-011. If you have any questions about this comment, please contact me at ph: (b) (6), or by email at (b) (6)@gmail.com.

Sincerely,

(b) (6)

Jennifer Swank



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The Voice of the Industrial Base

October 5, 2009

Ms. Hada Flowers
General Services Administration
FAR Secretariat Division (VPR)
1800 F Street, NW
Room 4041
Washington, DC 20405

Reference: Regulatory Flexibility Act, 5 U.S.C. 601, et seq., (FAR Case 2008-011, Government Property)

Dear Ms. Flowers:

The National Defense Industrial Association (NDIA) is pleased to respond to the request for comments published in the August 6, 2009, *Federal Register*, regarding Government Property and its associated clauses in the Federal Acquisition Regulation. These changes are intended to clarify and correct the previous FAR rule for Part 45, published under Federal Acquisition Circular 2005-17, FAR Case 2004-025.

NDIA is a non-partisan, non-profit organization with a membership that includes 1,578 companies and almost 73,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services, including research and development, procurement, and logistics support. While our members, who provide a wide array of goods and services to the government, include some of the nation's largest defense contractors, 48 percent of our corporate members describe themselves as small businesses.

NDIA has one significant area of concern that we believe constitutes a major change in policy and will impose additional requirements on small businesses. As such we believe that under the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and an Initial Regulatory Flexibility Analysis is required before a final rule is published. Specifically, language was added to FAR 15.404-4 that states, "Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property." The intent of this proposed change is not clear, removing application of profit or fee as a contract cost element is not appropriate, and such direction conflicts with the FAR profit policy.

"Publishers of National Defense Magazine"

Contractor-acquired property means property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title (FAR 45.101). On fixed-price contracts, the Government acquires title to non-deliverables under contract financing clauses (FAR 45.202). Title reverts to the contractor for property not delivered to the Government or incorporated into end items when the payments are liquidated and the end items are delivered (e.g., FAR 52.232-32(f)(6)). In other words, this property loses its designation as contractor-acquired property since title reverts to the contractor. The proposed change is not clear whether this property is entitled to profit or fee. On cost-reimbursement contracts, the Government acquires title to all property for which the contractor is entitled to reimbursement (FAR 45.202). Why would the Councils intend to deny profit or fee on all property on cost-reimbursement contracts that is not a line item deliverable even though the Government has title?

NDIA believes there is no basis to eliminate profit or fee on any element of cost necessary for the performance of a contract. It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilities of qualified large and small business concerns to Government contracts, and maintain a viable industrial base (FAR 15.404-4(a)(2)). Eliminating profit or fee may create undesirable incentives for both Government and industry:

- Substituting labor for more efficient and effective equipment.
- Entering into operating leases for equipment.
- Charging to overhead instead of direct contract costs.
- Failing to take delivery on property for funding reasons or short-term benefit while sacrificing long-term capability.

No rationale or justification for this change was provided in the proposed rule. We believe some Government personnel may be under the impression that this language was at one time included in the FAR and that the proposed change is a simple correction. That impression is not true. Prior to FAR 45 rewrite, FAR 45.302-3 stated, "No profit or fee shall be allowed on the cost of the facilities when purchased for the account of the Government under other than a facilities contract. General purpose components of special tooling or special test equipment are not facilities." The definition of facilities did not include material, special test equipment, special tooling, or agency-peculiar property. So this prior prohibition of profit or fee was very narrowly applied to facilities acquired by the contractor for the Government under non-facility contracts. The FAR Part 45 rewrite eliminated "facilities" and the Government wisely chose not to expand this narrow profit or fee prohibition to a broader category of property. The proposed change is confusing and potentially a major change in Government policy that would cause harm to the industrial base and particularly small businesses.

Small businesses often run on thin margins and have difficulty in raising capital to fund contracts. Contracts that require them to fund the acquisition of such property without the opportunity for profit or fee will only make their financial situation worse and dissuade them from entering or staying in the Government marketplace. In light of the above NDIA strongly recommends that the proposed change to FAR 15.404-4 be eliminated.

We appreciate the opportunity to comment. If you have questions or need additional information, please contact NDIA Procurement Division Director (b) (6) at (703) 247-2598 or at (b) (6)[@ndia.org](mailto:(b) (6)@ndia.org).

Sincerely,

(b) (6)

Vice President, Government Policy

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
4401 Wilson Boulevard, Suite 1110
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October 5, 2009

Ms. Hada Flowers
General Services Administration
FAR Secretariat Division (VPR)
1800 F Street, NW
Room 4041
Washington, DC 20405

Submitted via: <http://www.regulations.gov> and email

Subject: FAR Case 2008-011, Government Property
CODSIA Case 11-09

Dear Ms. Flowers:

The Council of Defense and Space Industry Associations (CODSIA)¹ is pleased to respond to the request for comments published in the August 6, 2009, *Federal Register*, regarding Government Property and its associated clauses in the Federal Acquisition Regulation. These changes are intended to clarify and correct the previous FAR rule for Part 45, published under Federal Acquisition Circular 2005-17, FAR Case 2004-025.

We welcome many of the proposed changes. Attached are our suggested clarifications to the proposed changes and additional recommendations. CODSIA has one significant area of concern that must be removed before a final rule is published. Language was added to FAR 15.404-4 that states, "Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property." The intent of this

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica (formerly AeA and ITAA), and the Chamber of Commerce of the United States of America. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

proposed change is not clear, removing application of profit or fee to a contract cost element is not appropriate and such direction conflicts with the FAR profit policy.

Contractor-acquired property means property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title (FAR 45.101). On fixed-price contracts, the Government acquires title to non-deliverables under contract financing clauses (FAR 45.202). Title reverts to the contractor for property not delivered to the Government or incorporated into end items when the payments are liquidated and the end items are delivered (e.g., FAR 52.232-32(f)(6)). In other words, this property loses its designation as contractor-acquired property since title reverts to the contractor. The proposed change is not clear whether this property is entitled to profit or fee. On cost-reimbursement contracts, the Government acquires title to all property for which the contractor is entitled to reimbursement (FAR 45.202). Why would the Councils intend to deny profit or fee on all property on cost-reimbursement contracts that is not a line item deliverable even though the Government has title?

CODSIA believes there is no basis to eliminate profit or profit on any element of cost necessary for the performance of a contract. It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilities of qualified large and small business concerns to Government contracts, and maintain a viable industrial base (FAR 15.404-4(a)(2)). Eliminating profit or fee may create undesirable incentives for both Government and industry:

- Substituting labor for more efficient and effective equipment.
- Entering into operating leases for equipment.
- Charging to overhead instead of direct contract costs.
- Failing to take delivery on property for funding reasons or short-term benefit while sacrificing long-term capability.

No rationale or justification for this change was provided in the proposed rule. We believe some Government personnel may be under the impression that this language was at one time included in the FAR and that the proposed change is a simple correction. That impression is not true. Prior to FAR 45 rewrite, FAR 45.302-3 stated, "No profit or fee shall be allowed on the cost of the facilities when purchased for the account of the Government under other than a facilities contract. General purpose components of special tooling or special test equipment are not facilities." The definition of facilities did not include material, special test equipment, special tooling, or agency-peculiar property. So this prior prohibition of profit or fee was very narrowly applied to facilities acquired by the contractor for the Government under non-facility contracts. The FAR Part 45 rewrite eliminated "facilities" and the Government wisely chose not to expand this narrow profit or fee prohibition to a broader category of property. The proposed change is confusing and potentially a major change in Government policy that would cause harm to the industrial base. CODSIA strongly recommends that the proposed change to FAR 15.404-4 be eliminated.

Thank you for the opportunity to comment. If you need any additional information, please contact the CODSIA project officer, (b) (6), AIA's Director of Financial Administration at (b) (6).

Sincerely,

(b) (6)

Director, Intellectual Property &
National Security
Aerospace Industries Association

(b) (6)

Executive Vice President & Counsel
Professional Services Council

(b) (6)

Vice President, National Security and
Procurement Policy
TechAmerica

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Executive Vice President
Government Affairs
U.S. Chamber of Commerce

(b) (6)

Vice President, Government Policy
National Defense Industrial Association

(b) (6)

Policy Committee Representative
American Council of Engineering
Companies

Attachment

**Federal Acquisition Regulation; FAR Case 2008-011, Government Property – Proposed Rule – August 6, 2009
CODSIA Comments**

Line#	FEDERAL REGISTER	SUGGESTED CHANGE	RATIONALE
	PART 2--DEFINITIONS OF WORDS AND TERMS		
2	Amend section 2.101, in paragraph (b)(2), by removing from the definition “Plant clearance office” the words “contractor-operator plants, and Federal installations” and adding “contractor-operator plants, Federal installations and Federal and non-Federal industrial operations”, in its place; and removing from the definition “Special tooling” the words “test equipment, and” and adding “tooling, and” in its place.	Concur.	
	PART 4--ADMINISTRATIVE MATTERS		
3	Amend section 4.705-3 by adding paragraph (h) to read as follows: 4.705-3 -- Acquisition and Supply Records. * * * * * (h) Property records (see 45.101 and 52.245-11): Retain 4 years.	Provide clarification about the meaning of “property records” and “retain for 4 years”.. Specifically, what constitutes “records” in 45.101 Definitions, and when does the retention period start, upon, occurrence, disposition of property, upon final payment, upon contract close? Recommend that the retention period begin at disposition of property. Delete in 4.705(c) “consisting of equipment usage and status reports”	Clarification. Equipment usage logs and status reports are no longer required with the issuance of the current FAR 45 Government Property.
	PART 15 – CONTRACTING BY NEGOTIATION		

4	<p>Amend section 15.404-4 by adding a sentence to the end of paragraph (a)(3) to read as follows:</p> <p>15.404-4 Profit</p> <p>(a) * * *</p> <p>(3) * * * Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property.</p> <p>* * * * *</p>	Delete amendment.	Addressed in cover letter.
	PART 32 – CONTRACT FINANCING		
5	<p>Amend section 32.503-16 by removing from paragraph (a) “loss, theft, destruction, or damage to” and adding “lost, stolen, damaged, or destroyed in its place.</p>	<p>Change proposed amendment by removing from paragraph (a) “loss, theft, destruction, or damage to” and adding “loss” in its place.</p>	<p>Consistency and industry best practice.</p> <p>There is a need to consider the cost vs. benefit in how the traditional “Loss, Damage and Destruction” (LDD) is described – Loss, Damage, Destruction, and Theft (LDDT); Loss, Theft, Damage, and Destruction (LTDD) and now lost, stolen, damaged, or destroyed (LSDD).</p> <p>These small changes, without a substantial difference, cost a considerable amount of unnecessary time to discuss and implement changes to company forms and procedures -- all with no corresponding benefit. Theft, damage, and destruction are all subsets of property loss. There is no requirement to individually capture these subsets. Simplicity should trump precision.</p> <p>This approach is consistent with commercial practices and definitions.</p>

6	Amend section 32.1010 by removing from paragraph (a) ``loss, theft, destruction, or damage to" and adding ``lost, stolen, damaged, or destroyed" in its place.	Change the proposed amendment by removing from paragraph (a) ``loss, theft, destruction, or damage to" and adding "loss" in its place.	See comments in line item #5 above.
	PART 42--CONTRACT ADMINISTRATION AND AUDIT SERVICES		
7	<p>Amend section 42.302 by revising paragraphs (a)(30)(iii) and (a)(30)(v) to read as follows:</p> <p>42.302 Contract administration functions.</p> <p>(a) * * *</p> <p>(30) * * *</p> <p>(iii) Evaluate the use of Government property on a non-interference basis in accordance with the clause at 52.245-9, Use and Charges;</p> <p>* * * * *</p> <p>(v) Modify contracts to reflect addition of Government furnished property and ensure appropriate consideration.</p> <p>* * * * *</p>	<p>Add to the following to the end of revised paragraph (a)(30)(iii):</p> <p>(iii) Evaluate the use of Government property on a non-interference basis in accordance with the clause at 52.245-9, Use and Charges; and guidance at 45.103(a)(4) with the maximum use of Government property already in the contractors' possession.</p>	<p>Clarification.</p> <p>Clarify the intent of the Government to maximize use and return on investment of Government Property with or without rental payments.</p>
	PART 45--GOVERNMENT PROPERTY		
8	<p>Amend section 45.101 by—</p> <p>a. Revising the definitions ``Cannibalize", ``Equipment", ``Government-furnished property", and ``Government property";</p>	<p>Change the amended definitions to read:</p> <p>Cannibalize means to remove worthwhile parts from property for probable use or installation on other property.</p>	<p>Clarification and correction.</p> <p>Proposed change to the amended definition will continue to reinforce the concept that cannibalization should be worthwhile.</p>

	<p>b. Removing from the definition ``Material" the words ``test equipment" and adding ``test equipment or real property" in its place;</p> <p>c. Removing the definition ``Plant equipment";</p> <p>d. Adding the definition ``Property records"; and</p> <p>e. Revising the definition ``Real property.</p> <p>The revised and added text reads as follows:</p> <p>45.101 Definitions. * * * * *</p> <p>Cannibalize means to remove parts from equipment, special tooling or special test equipment in order to install them on other property. * * * * *</p> <p>Equipment means a tangible item that is functionally complete for its intended</p>	<p>Government-furnished property means property in the possession of the contractor that was directly acquired by the Government and subsequently furnished to the contractor for performance of a contract. Government-furnished property includes, but is not limited to spares and property furnished for repair, maintenance, overhaul, or modification. Contractor acquired property becomes Government furnished property upon delivery in place; by contract modification or reutilization transfers through plant clearance.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p>	<p>Incorporate all types of categories of property; e.g. equipment, special tooling or special test equipment; material; repairables</p> <p>All Government property in possession is not government furnished.</p> <p>Government furnished property may be in the form of equipment or material – repairables or expendables, etc. and may be transferred from a prior contract as deliverable.</p>
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<p>purpose, durable, nonexpendable, and needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use. Equipment does not include material or real property.</p> <p>Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract. Government-furnished property includes spares and property furnished for repair, maintenance, overhaul, or modification</p> <p>Government property means all property owned or leased by the Government. Government property includes both Government-furnished property and contractor-acquired property. Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property, and software. * * * * *</p> <p>Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property. * * * * *</p>		
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	Real property. See Federal Management Regulation 102-71.20 (41 CFR 102-71.20.) * * * * *		
8a	Not Addressed	<p>Add the following new definition to 45.101</p> <p>Property loss(es) means unintended, unforeseen or accidental loss, damage and destruction to tangible Government property that reduces the government's expected economic benefits of the property. Loss includes items that cannot be found after a reasonable search that are probably lost or stolen. Losses are not routine inventory adjustments and clerical or process errors or omissions. Damages are unexpected harm to property that require repair to restore to usable condition. Destruction occurrences to property are those instances rendering the item useless for its intended purpose or beyond economical repair. Losses do not include purposeful destructive testing, loss in value due to business conditions, obsolescence or normal wear and tear, shrinkage or manufacturing defects. Property loss occurrences are deemed harmful to the government and are subject to paragraph (h) <i>Contractor Liability for Government Property of FAR 52.245-1 Government Property.</i></p>	<p>Completeness and clarity.</p> <p>A large portion of the modification of the proposed rule contains references to Loss, damage and destruction of government property, yet it is not defined. As such, no definition or loose application can mislead decision makers or cause unreasonable expenditure of indirect or direct costs to find things that are not worthwhile. Theft is a subset to loss and by giving it a separate standing infers a criminal act that generally needs to be proven.</p> <p>It is time to consider fewer words. "Loss" which is the industry term for such occurrences, would encompass all scenarios: the unexpected loss of property whether it is through loss, damage, destruction, theft, etc.</p>
9	<p>Amend section 45.102 by revising paragraph (d) to read as follows:</p> <p>45.102 Policy.</p>	Concur.	

	<p>* * * * *</p> <p>(d) Exception. Property provided under contracts for repair, maintenance, overhaul, or modification is not subject to the requirements of paragraph (b) of this section.</p>		
9a	Not Addressed	<p>Add the following new paragraph to 45.102:</p> <p>(e) It is the policy of the Federal Government to spend taxpayer dollars effectively, and more effectively each year. Agencies shall apply taxpayer resources efficiently in a manner that maximizes the effectiveness of Government programs in serving the American people.</p> <p>Those who have oversight of the management control, and accountability of Government property, as well as contractors who have possession of Government property, shall seek continuous process improvement in order to seek best value for customers. Processes must seek to minimize administrative operating costs. Materiality concepts apply. Processes and policies should only be promulgated to the extent when their benefits clearly exceed the costs of their development, implementation, administration, and enforcement.</p>	<p>Consistency.</p> <p>The existing policy statement policy does not provide the proper overall tone for effective and efficient property management. <i>Executive Order 13450 - Improving Government Programs</i> was not in existence when the 52-245-1 clause was released in 2007. It should be quoted in the FAR.</p> <p>Inefficient Government property management practices continue, in many cases, to cause the government to spend taxpayer resources less efficiently than need be.</p> <p>Frequently the property management clause is referenced as justification to continue inefficient and ineffective practices. Government contractors and Government oversight officials need to be reminded that the cost vs. benefits and materiality are constraints that must be recognized in order to achieve best value for the customer and the taxpayer.</p> <p>Frequently oversight officials do not consider cost vs. benefits and materiality and thus enforce uneconomical practices under the guise or based upon contract compliance or the elimination of risk.</p>

			The inserted paragraph recognizes the requirements of the executive order as well as the requirements in FAR Part 1.
9b	Not Addressed	<p>Amend 45.103(a)(2) as follows:</p> <p>45.103 General.</p> <p>(a) Agencies shall—</p> <p>(2) Eliminate to the maximum practical extent any competitive advantage during the contract award process a prospective contractor may have by using Government property;</p>	Contractors have experienced a reluctance on the part of contracting officers to allow contractors to use Government property, even with rental charges, because of competitive advantage reasons. The additional words emphasizes that that consideration of competitive advantage only applies during the solicitation and award process. Thereafter maximum use property is desired to the best benefit of the Government.
10	<p>Amend section 45.104 by revising the introductory text of paragraph (a) to read as follows:</p> <p>45.104 Responsibility and liability for Government property.</p> <p>(a) Generally, contractors are not held liable for loss, theft, damage, or destruction of Government property under the following types of contracts:</p> <p>* * * * *</p>	<p>Change the proposed amendment by replacing "loss, theft, damage, or destruction" with "loss" so that the amended paragraph reads:</p> <p>(a) Generally, contractors are not held liable for loss of Government property under the following types of contracts:</p>	See comments in line item #5 above.
11	<p>Amend section 45.105 by revising paragraph (b)(1); and removing from paragraph (d) "damage, destruction, or theft" and adding "theft, damage, or destruction" in its place. The revised text reads as follows:</p> <p>45.105 Contractors' property management system compliance.</p>	<p>Change the amendment of 45.105(b) to read as follows:</p> <p>(b) The property administrator shall notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, and shall request prompt correction of deficiencies (and shall provide) with a</p>	<p>Improve audit protocol and due process.</p> <p>There is a need for a better audit protocol and due process. Frequently identified deficiencies are of an immaterial nature and costs to correct greatly exceed benefits from those corrections.</p> <p>Property administrators and contracting</p>

	<p>*****</p> <p>(b) ***</p> <p>(1) Revocation of the Government's assumption of risk for loss, theft, damage, or destruction; and/or</p> <p>*****</p>	<p>schedule for their completion. Identified deficiencies must rise to the level of probable material negative impact to contract cost and schedule.</p> <p>(i) If the Contractor agrees with the report findings and recommendations, the Contractor shall—</p> <p>(A) Within 30 days (or such other date as may be mutually agreed to by property administrator and the Contractor), state its agreement in writing; and</p> <p>(B) Within 60 days (or such other date as may be mutually agreed to by the property administrator and the Contractor), correct the deficiencies or submit a corrective action plan showing milestones and actions to eliminate the deficiencies.</p> <p>(ii) If the Contractor disagrees with the report findings and recommendations, the Contractor shall, within 30 days (or such other date as may be mutually agreed to by the property administrator and the Contractor), state its rationale for each area of disagreement and respond to the property administrator and the contracting officer.</p> <p>(2) The property administrator will evaluate the Contractor's response and will notify the Contractor in writing of the—</p> <p>(i) Determination concerning any remaining deficiencies;</p> <p>(ii) Adequacy of any proposed or completed corrective action plan; and</p> <p>(iii) Need for any new or revised corrective action plan.</p> <p>(3) When the property administrator and contracting officer determines the deficiencies have a material impact on Government contract costs, the contracting</p>	<p>officers must work together and agree the suggestions made are worth while – including the diversion of program resources to property management activities.</p> <p>Constructive dialogue between the government and the contractor is important to arrive at optimal solutions.</p> <p>The suggested protocol was adapted from the MMAS clause in DFARS 252.242-7004 Material Management and Accounting System.</p>
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		<p>officer must reduce progress payments by an appropriate percentage based on affected costs (in accordance with FAR 32.503-6) or disallow costs on vouchers (in accordance with FAR 42.803) until the contracting officer determines that--</p> <p>(i) The deficiencies are corrected; or</p> <p>(ii) The amount of the impact is immaterial.</p> <p>(4) If the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer shall notify the contractor, in writing, that failure to take the required corrective action(s) may result in—</p> <p>(i) Revocation of the Government's assumption of risk for loss, or</p> <p>(ii) The exercise of other rights or remedies available to the contracting officer.</p>	<p>LTDD was changed to "loss". See comments in line item #5 above.</p>
12	Amend section 45.201 by removing from paragraph (a)(4) "Unique-item" and adding "Item unique" in its place; and removing from paragraph (d) "When use of property on more than one contract is anticipated, any" and adding "Any" in its place.	Change the amendment to use the term " unique item identifier (UII) " in place of "item unique".	<p>Clarification.</p> <p>Per the DFARS clause and other UID materials from the DoD Program Office, the correct term is <u>unique item identifier or (UII)</u></p>
12a	Not Addressed	<p>Amend 45.202(a) to read:</p> <p>(a) The contracting officer shall consider any potentially unfair competitive advantage that may result from the prospective contractor possessing Government property. This shall be done by adjusting the offers by applying, for evaluation purposes only, a rental equivalent evaluation factor.</p>	<p>Clarification.</p> <p>The restriction only applies during the contract solicitation and award process. Limiting the use of government property at appropriate times is harmful to the Government and the contractor. This issue has been confusing to some contracting officers. Not having access to Government property for use on other cost objectives may cause the contractor to purchase like capital or IR&D equipment, which will become indirect cost to contracts.</p>

12b	Not Addressed	<p>Amend 45.301 by inserting a comma after the word “authorized” in paragraph (b) and making two sentences out of paragraph (b) so that it reads as follows:</p> <p>(b) Rental charges, to the extent authorized, do not apply to Government property that is left in place or installed on contractor-owned property for mobilization or future Government production purposes;</p> <p>(c) Rental charges shall apply to property to be used for non-government commercial purposes,</p>	Clarification.
12c	Not Addressed	<p>Amend 45.303 by adding “rent-free” to the use of property on IR&D programs and replacing “reimbursement” with “rental value.” Remove the current paragraph (c) and replace it with a new paragraph (c). The resulting 45.303 reads as follows:</p> <p>The contracting officer may authorize a contractor to use the property on an independent research and development (IR&D) program rent free, if—</p> <p>(a) Such use will not conflict with the primary use of the property or enable the contractor to retain property that could otherwise be released;</p> <p>(b) The contractor agrees not to claim rental value against any Government contract for the property; and</p> <p>(c) Estimated rental proceeds are immaterial or rental cost to the contractor would subsequently, in a substantial way, be charged back to the Government as part of indirect cost.</p>	<p>Clarification.</p> <p>The current language is confusing, provides disincentives for improvements to products and needlessly causes excessive administrative cost.</p> <p>For substantial amounts – the contracting officer retains the right to charge rent via the Use and Charges Clause.</p>

13	<p>Amend section 45.402 by revising paragraph (a) to read as follows:</p> <p>45.402 Title to contractor-acquired property.</p> <p>(a) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property. * * * * *</p>	<p>Revise the amended 45.402(a) so that it reads as follows:</p> <p>(a) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract upon delivery (through a contract modification listing the item) as Government-furnished property.</p>	<p>Cost Reduction.</p> <p>If the deliverable item is delivered, as intended, in place per the contract -- then there is not need for a contract modification as no modification has occurred. For example, if the Government intends to take title to Special Test Equipment on a cost plus contract and the STE is a deliverable in the contract, upon delivery the item is recorded as Government Furnished Equipment in the contractor's records. Creating a modification provides no value and just provides unnecessary administrative cost.</p>
14	<p>Revise section 45.502 to read as follows:</p> <p>45.502 Subcontractor and alternate prime contractor locations.</p> <p>(a) To ensure subcontractor compliance with Government property administration requirements, and with prime contractor consent, the property administrator assigned to the prime contract may request support property administration</p>	<p>Revise 45.501 and the amended 45.502 to read as follows:</p> <p>45.501 Prime contractor alternate locations. (a) The property administrator assigned to the prime contract may request support property administration from another contract administration office, for purposes of evaluating prime contractor management of property located at the prime contractor's alternate locations.</p>	<p>Clarification.</p> <p>Prime contractor alternate locations are not the same as subcontractors in many respects.</p> <p>FAR 45.501 should apply to the prime's alternate locations and 45.502 should apply to subcontractor locations.</p>

	<p>from another contract administration office. If the prime contractor does not provide consent to support property administration at subcontractor locations, the property administrator shall refer the matter to the contracting officer for resolution.</p> <p>(b) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system.</p> <p>(c) Prime contractor consent is not required for support delegations involving prime contractor alternate locations.</p>	<p>(b) Prime contractor consent is not required for support delegations involving prime contractor alternate locations</p> <p>45.502 Subcontractor locations. (b) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system.</p>	
15	Amend section 45.602-3 by removing from paragraph (b)(3) ``North Capitol and H Streets" and adding ``732 North Capitol Street" in its place.	<p>Concur with amendment to 45.602-3(b)(3).</p> <p>Add amendment to 45.602-3(b)(2) to address fair market value in lieu of acquisition cost. New paragraph (b)(2)(iii) would read as follows:</p> <p>(iii) If the property is contractor-acquired or produced, and the contractor or subcontractor has expressed an interest in acquiring the property, and no other party expresses an interest during agency or GSA screening, the property may be sold to the contractor or subcontractor at fair value. For guidance in arriving at fair value estimates use FAR 52.245-9 the Use and Charges clause or agency internal depreciation policy.</p>	<p>Reasonableness and consistency.</p> <p>It is unreasonable to expect contractors to pay acquisition cost for used items. A fair and reasonable price would be fair value – generally a depreciated amount.</p> <p>The requiring acquisition cost has it roots from old policy prior to the Government depreciating assets. New policy should reflect recent accounting rules.</p>
15a	Not Addressed	Rewrite 45.603 so that it reads as follows:	Clarification and cost reduction.

		<p>45.603 Abandonment, destruction or donation of excess personal property.</p> <p>(a) Abandonment of non-sensitive property should be considered a part of the a property utilization analysis, prior to the disposition process and acted upon when the estimated care and handling cost to sell the property, including disassembly, moving, storage, inspections advertising and other administrative costs associated with making the sale, is greater than the probable sale proceeds. Performing this analysis and considering abandonment after spending significant care and handling cost is wasteful. Plant clearance officers should consider contractor requests for abandonment and grant approval when in the best interest of the Government. Plant clearance officers may abandon sensitive property that does not require demilitarization, with contractor consent, provided appropriate instructions are provided with respect to the proper care, handling, and disposal of the property.</p> <p>(b) Destruction or demilitarization of property should be considered when sale, donation and abandonment are inappropriate and the Government has an obligation to demilitarize or remove Government property from a contractor's premises. The Plant Clearance Officer shall coordinating funding for demilitarization, destruction and removal with the contracting officer.</p> <p>(c) Donation of excess Government personal property to eligible donees in lieu of</p>	<p>The actions of abandonment are treated differently from destruction and donation under the Federal Property and Administrative Services Act of 1949. The regulation should also reflect those differences. Each alternative should be used as appropriate. Mandatory wasteful processes, such as considering abandonment only after significant care and handling cost have been spent should be eliminated.</p>
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		<p>abandonment should be considered if the Government will not bear any of the costs incident to a donation.</p> <p>(d)(1) Before abandoning, destroying, or donating excess personal property, the plant clearance officer shall</p> <p>(i) Determine in writing that the property does not constitute a danger to public health or welfare, and</p> <p>(ii) The property has no residual monetary value.</p> <p>(2) A Government reviewing official shall approve all written determinations for abandonment and destruction actions.</p>	
16	<p>Revise section 45.604-3 to read as follows:</p> <p>45.604-3 Sale of surplus personal property.</p> <p>Policy for the sale of surplus personal property is contained in the Federal Management Regulations, at Part 102-38 (41 CFR Part 102-38). Agencies may specify implementing procedures.</p>	Concur.	
17	<p>Amend section 45.606-1 by revising paragraph (b) and adding paragraph (c) to read as follows:</p> <p>45.606-1 Contractor with an approved scrap procedure.</p> <p>* * * * *</p> <p>(b) For scrap from other than production or testing, the contractor may</p>	<p>Revise the amendment so that paragraph 45-606-1(b) reads as follows:</p> <p>(b) For scrap from other than production or testing, the contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the property management plan or approvals by the property administrator or contracting</p>	<p>Cost reduction.</p> <p>Approvals regarding contracts and contract cost are best performed by those who are responsible for the success of the contract.</p> <p>Approved scrap procedures should be a component of the contractor's property management plan.</p>

	<p>prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures).</p> <p>(c) Inventory disposal schedules shall be submitted for all aircraft regardless of condition, flight safety critical aircraft parts, and scrap that--</p> <ul style="list-style-type: none"> (1) Requires demilitarization; (2) Is a classified item; (3) Is generated from classified items; (4) Contains hazardous materials or hazardous wastes; (5) Contains precious metals that are economically beneficial to recover; or (6) Is dangerous to the public health, safety, or welfare. 	<p>officer). (the approved scrap procedures.)</p>	<p>This will encourage planning on the part of the contractor and the government to efficiently handle contract scrap and ultimately reduce administrative costs.</p>
	PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES		
18	<p>Amend section 52.232-16 by--</p> <ul style="list-style-type: none"> a. Removing from the clause heading "(JUL 2009)" and adding "(DATE)" in its place; b. Removing from paragraph (d)(2)(ii) "under any other clause of this contract"; c. Removing from paragraph (d)(3) "or special tooling"; and d. Removing from paragraph (e) "is damaged, lost, stolen, or" and adding "is lost, stolen, damaged, or" in its place. 	<p>Revise amendment in 52.232-16(e) by deleting the addition "is lost, stolen, damaged, or" and removing "destroyed" from the current language and replacing LSDD by "is lost." The new sentence would read as follows:</p> <p>"The Contractor shall repay the Government an amount equal to the unliquidated progress payments that are based on costs allocable to property that is lost."</p>	<p>See comments in line item #5 above.</p>
19	<p>Amend section 52.232-32 by—</p> <ul style="list-style-type: none"> a. Removing from the clause heading 	<p>Revise amendment in 52.232-16(g) by deleting the addition "is lost, stolen,</p>	<p>See comments in line item #5 above.</p>

	<p>“(JAN 2008)” and adding “(DATE)” in its place;</p> <p>b. Removing from paragraph (f)(2)(ii) “under any other clause of this contract”;</p> <p>c. Removing from paragraph (f)(3) “or special tooling”; and</p> <p>d. Removing from paragraph (g) “is damaged, lost, stolen, or” and adding “is lost, stolen, damaged, or” in its place.</p>	<p>damaged, or” and removing “destroyed” from the current language and replacing LSDD by “is lost.”</p>	
20	<p>Amend section 52.245-1 by—</p> <p>a. Revising the date of the clause;</p> <p>b. In paragraph (a) by—</p> <p>1. Revising the definition “Cannibalize”;</p> <p>2. Removing from the definition “Equipment” the word “asset” and adding the word “item” in its place; and adding a sentence to the end of the definition;</p> <p>3. Adding a sentence to the end of the definition “Government-furnished property”;</p>	<p>Change the amended 52.245-1 as shown below:</p> <p>Concur.</p> <ul style="list-style-type: none"> Revise the amended definitions in 52.245-1(a) to read as follows: <p>Cannibalize means to remove worthwhile parts from property for probable use or installation on other property.</p> <p>Concur</p> <p>Government-furnished property means property in the possession of the contractor that was directly acquired by the Government and subsequently furnished to the contractor for performance of a contract or acquired by the contractor and delivered to the</p>	<p>Clarification and accuracy.</p> <p>Proposed change to the amended definition will continue to reinforce the concept that cannibalization should be worthwhile.</p> <p>Incorporate all types of categories of property; e.g. equipment, special tooling or special test equipment; material; repairables</p> <p>All Government property in possession is not government furnished. Government furnished property may be in the form of equipment or material – repairables or expendables, etc.</p>

	<p>4. Adding a sentence to the end of the definition ``Government property";</p> <p>5. Adding the words ``or real property" to the end of the definition ``Material";</p> <p>6. Removing the definition ``Plant equipment";</p> <p>7. Adding, in alphabetical order, the definition ``Property records"; and</p> <p>8. Revising the definition ``Real property";</p> <p>c. Revising the first sentence of paragraph (b)(2), (c), and (e)(2)(ii);</p> <p>d. Removing from paragraphs (e)(2)(iii) and (f)(1)(i) the word ``material" and adding the word ``property" wherever it occurs (8 times);</p> <p>e. Removing from paragraph (f)(1)(iii)(A)(4) the word ``Unique-item" and adding the words ``Item unique" in its place;</p>	<p>Government. Government-furnished property includes, but is not limited to spares and property furnished for repair, maintenance, overhaul, or modification. Contractor acquired property becomes Government furnished property upon delivery, e.g. in place; by contract modification or reutilization through plant clearance.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <ul style="list-style-type: none"> • Change the amended 52.245-1(b)(2) to read "... or via a completed investigation, evaluation, and final determination for loss of property." <p>Concur with (c) and (e)(2)(ii)</p> <p>Concur.</p> <ul style="list-style-type: none"> • Change the amended 52.245-1(f)(1)(iii)(A)(4) to use the term "unique 	<p>See comments in line item #5 above.</p> <p>See comments in line item #12 above.</p>
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	<p>f. Revising paragraph (f)(1)(v)(A), introductory text of paragraph (f)(1)(vi), paragraphs (f)(1)(vi)(A), (f)(1)(vi)(B)(4), (f)(1)(vi)(B)(10), (f)(1)(vii)(A), (f)(1)(viii)(B), (f)(1)(x), (h)(1), the first sentence of paragraph (h)(1)(ii), (h)(1)(iii), the first sentence of paragraph (h)(2), paragraph (h)(3), the second sentence of paragraph (i), and paragraph (j)(1)(i)(B);</p>	<p>item identifier (UII)” in place of “item unique”</p> <ul style="list-style-type: none"> • Change the amended 52.245-1(f)(1)(v)(A) to read “... conditions (e.g., extent of liability for loss, of Government property).” • Change the amended 52.245-1(f)(1)(vi) to replace “loss, theft, damage, or destruction” with “loss.” • Change the amended 52-245-1(f)(vi)(A) to replace “loss, theft, damage, or destruction” with “loss” both places where it appears. • Change the amended 52.245-1(f)(1)(vi)(B)(4) to replace “Item unique item identifier” with “unique item identifier”. • Change the amended 52-245-1(f)(1)(vi)(B)(10) to replace “loss, theft, damage, or destruction” with “loss.” • Change the amended 52-245-1(f)(1)(vii)(A) to replace “loss, theft, damage, or destruction” with “loss.” • Change the amended 52-245-1(f)(1)(viii)(B) to read as follows: <p>Unless otherwise authorized in this contract or by the Property Administrator the Contractor shall not commingle, while in storage or in stockrooms, Government material with material not owned by the</p>	<p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>See comments in line item #12 above.</p> <p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>Expendables in use may be collocated – it is understood that commingling of items should be avoided if ownership rights will be breached. Reference MMAS.</p>
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		<p>Government. This excludes items in the production process such as bench stock, expendables, or scrap.</p> <ul style="list-style-type: none"> Change the amended 52-245-1(f)(1)(x) to read: <p>The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss cases; physically inventorying [a#] property adequate for contract closure upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.</p> <ul style="list-style-type: none"> Change the amended 52.245-1(g)(1) to read as follows: <p>The Government shall have access to the contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan(s), systems, procedures, records, and supporting documentation that pertains to Government property.</p> <ul style="list-style-type: none"> Change the amended 52.245-1(g)(3) to read as follows: <p>(i) Insignificant observations, recommendations, corrections or improvements should be resolved at the lowest responsible level during the analysis, either verbally or in writing. Should it be</p>	<p>See comments in line item #5 above.</p> <p>Inventories should be limited to accountable property, otherwise expensive and time consuming inventories will be conducted on immaterial items.</p> <p>This will mitigate unnecessary inventories where inventories are normal part of contractor processes. No need to drive unnecessary administrative costs.</p> <p>The language "adequate for contract closure" is an industry leading practice and was used in FAR 45.508-1 March 2005.</p> <p>There may be more than one plan.</p> <p>There is a need for a better audit protocol and due process. Frequently identified deficiencies are of an immaterial nature and the costs to correct greatly exceed benefits from those corrections.</p> <p>Property administrators and contracting officers must work together and agree the suggestions made are worthwhile – including</p>
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		<p>determined by the Government that the Contractor's [(or subcontractor's)] property management practices are deficient inadequate or not acceptable for the effective and efficient management and control of Government property under this contract, or present an undue risk to the Government, the Contractor shall [immediately] take all reasonable necessary corrective actions in a timely manner as directed by the Property Administrator. Direction believed to be beyond the scope of the contract shall be resolved with the contracting officer.</p> <p>(ii) The property administrator shall notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, and shall request prompt correction of deficiencies with a schedule for their completion. Identified deficiencies must rise to the level of probable material negative impact to contract cost and schedule.</p> <p>(1) If the Contractor agrees with the analysis findings and recommendations, the Contractor shall—</p> <p>(A) Within 30 days (or such other date as may be mutually agreed to by property administrator and the Contractor), state its agreement in writing; and</p> <p>(B) Within 60 days (or such other date as may be mutually agreed to by the property administrator and the Contractor), correct the deficiencies or submit a corrective action plan showing milestones and actions to eliminate the deficiencies.</p> <p>(2) If the Contractor disagrees with the report</p>	<p>the diversion of program resources to property management activities.</p> <p>Constructive dialogue between the government and the contractor is important to arrive at optimal solutions.</p> <p>The suggested protocol was adapted from the MMAS clause in DFARS 252.242-7004 Material Management and Accounting System.</p> <p>Contractors must balance completing objectives – cost, schedule and risk. Disagreements must be resolved via the contracting officer. Constructive conflict is healthy for the contracting process.</p>
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		<p>findings and recommendations, the Contractor shall, within 30 days (or such other date as may be mutually agreed to by the property administrator and the Contractor), state its rationale for each area of disagreement and respond to the property administrator and the Contracting Officer.</p> <p>(A) The property administrator will evaluate the Contractor's response and will notify the Contractor in writing of the—</p> <p>(i) Determination concerning any remaining deficiencies;</p> <p>(ii) Adequacy of any proposed or completed corrective action plan; and</p> <p>(iii) Need for any new or revised corrective action plan.</p> <p>(B) When the property administrator and Contracting Officer determines the deficiencies have a material impact on Government contract costs, the Contracting Officer must reduce progress payments by an appropriate percentage based on affected costs (in accordance with FAR 32.503-6) and/or disallow costs on vouchers (in accordance with FAR 42.803) until the Contracting Officer determines that--</p> <p>(i) The deficiencies are corrected; or</p> <p>(ii) The amount of the impact is immaterial.</p> <ul style="list-style-type: none"> • In the amended 52.245-1(h)(1) change “loss, theft, damage, or destruction” to “loss”. • In the amended 52.245-1(h)(1)(ii) change “loss, theft, damage, or destruction” to 	<p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p>
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	<p>g. Add paragraphs (j)(3)(v), and (j)(3)(vi);</p> <p>h. Add paragraph (j)(1)(i)(C);</p> <p>i. Revise paragraphs (j)(3)(iii)(E), and (j)(3)(iv);</p>	<p>“loss”.</p> <ul style="list-style-type: none"> • In the amended 52.245-1(h)(1)(iii) change “loss, theft, damage, or destruction” to “loss” each time it appears. • In the amended 52.245-1(h)(2) change “loss, theft, damage, or destruction” to “loss”. • In the amended 52.245-1(h)(3) change “loss, theft, damage, or destruction” to “loss”. • In the amended 52.245-1(j)(1)(i)(B) change the amended paragraph to read as follows: <p>For scrap from other than production or testing, the Contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the contractor's property management plan or approvals by the property administrator or contracting officer) [approved scrap procedures].</p> <p>Concur.</p> <p>Concur.</p> <ul style="list-style-type: none"> • Delete the new paragraph 52.245-1(j)(3)(iv)(A) regarding special tooling and special test equipment and renumber the remaining paragraphs accordingly and 	<p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>Consistent with use of the Property Management Plan.</p> <p>Remove the requirement or limit its application. The cost of this requirement will greatly exceed the benefits derived. Extensive experience with the reutilization of Special Tooling and Special Test Equipment shows these types of efforts are never worth while. If this information is required it should be a CDRL and the items should be</p>
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	<p>1. In Alternate I, revise the date of the alternate, and the first sentence of paragraph (h)(1).</p> <p>The added and revised text reads as follows:</p> <p>52.245-1 Government Property. * * * * *</p> <p>GOVERNMENT PROPERTY (DATE) (a) * * * * * * * *</p> <p>Cannibalize means to remove parts from equipment, special tooling or special test equipment in order to install them on other property. * * * * *</p> <p>Equipment * * * Equipment does not include material or real property</p> <p>Government-furnished property * * * Government-furnished property includes spares and property furnished for repair, maintenance, overhaul, or modification.</p> <p>Government property * * * Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property, and software. * * * * *</p>	<p>Contracting Officer or by the Plant Clearance Officer, the Contractor shall remove or destroy any [Government affixed] markings identifying the property as U.S. Government-owned property prior to its disposal unless superseded in the contract.</p> <ul style="list-style-type: none"> • In the amended 52.245-1 Alternate 1 (Date) *** (h)(1), replace "loss, theft, damage, or destruction" with "loss". 	<p>See comments in line item #5 above.</p>
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<p>Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.</p> <p>Real property. See Federal Management Regulation 102-71.20 (41 CFR 102-71.20).</p> <p>* * * * *</p> <p>(b) * * *</p> <p>(2) The Contractor's responsibility extends from the initial acquisition and receipt of property, through stewardship, custody, and use until formally relieved of responsibility by authorized means, including delivery, consumption, expending, sale (as surplus property), or other disposition, or via a completed investigation, evaluation, and final determination for lost, stolen, damaged, or destroyed property. * * *</p> <p>* * * * *</p> <p>(c) Use of Government property. (1) The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided for in this contract or approved by the Contracting Officer.</p> <p>(2) Modifications or alterations of Government property are prohibited, unless they are--</p> <p>(i) Reasonable and necessary due to the scope of work under this contract or its terms and conditions;</p> <p>(ii) Required for normal maintenance;</p>		
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<p>or</p> <p>(iii) Otherwise authorized by the Contracting Officer.</p> <p>(3) The Contractor shall not cannibalize Government property unless otherwise provided for in this contract or approved by the Contracting Officer.</p> <p>* * * *</p> <p>(e) * * *</p> <p>(2) * * *</p> <p>(ii) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.</p> <p>* * * *</p> <p>(f) * * *</p> <p>(1) * * *</p> <p>(v) * * *</p> <p>(A) The Contractor shall award subcontracts that clearly identify assets to be provided and shall ensure appropriate flow down of contract terms and</p>		
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<p>conditions (e.g., extent of liability for loss, theft, damage, or destruction of Government property).</p> <p>* * * * *</p> <p>(vi) Reports. The Contractor shall have a process to create and provide reports of discrepancies; loss, theft, damage, or destruction; physical inventory results; audits and self-assessments; corrective actions; and other property related reports as directed by the Contracting Officer.</p> <p>(A) Loss, theft, damage, or destruction. Unless otherwise directed by the Property Administrator, the Contractor shall investigate and promptly furnish a written narrative of all incidents of loss, theft, damage, or destruction to the property administrator as soon as the facts become known or when requested by the Government.</p> <p>(B) * * *</p> <p>(4) Item unique Item Identifier (if available).</p> <p>* * * * *</p> <p>(10) A statement that the Government will receive any reimbursement covering the loss, theft, damage, or destruction in the event the Contractor was or will be reimbursed or compensated.</p> <p>* * * * *</p> <p>(vii) * * *</p> <p>(A) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract, including reasonable inventory</p>		
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<p>adjustments of material as determined by the Property Administrator; or a Property Administrator granted relief of responsibility for loss, theft, damage, or destruction of Government property; * * * * *</p> <p>(viii) * * *</p> <p>(B) Unless otherwise authorized in this contract or by the Property Administrator the Contractor shall not commingle Government material with material not owned by the Government. * * * * *</p> <p>(x) Property closeout. The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss, theft, damage, or destruction cases; physically inventorying all property upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs. * * * * *</p> <p>(g) Systems analysis</p> <p>(1) The Government shall have access to the Contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan, systems, procedures, records, and supporting documentation that pertains to Government property. This access includes all site locations and, with the Contractor's consent, all</p>		
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<p>subcontractor premises.</p> <p>(2) Records of Government property shall be readily available to authorized Government personnel and shall be appropriately safeguarded.</p> <p>(3) Should it be determined by the Government that the Contractor's (or subcontractor's) property management practices are inadequate or not acceptable for the effective management and control of Government property under this contract, or present an undue risk to the Government, the Contractor shall immediately take all necessary corrective actions as directed by the Property Administrator.</p> <p>* * * * *</p> <p>(h) * * *</p> <p>(1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, theft, damage, or destruction to the Government property furnished or acquired under this contract, except when any one of the following applies--</p> <p>* * * * *</p> <p>(ii) The loss, theft, damage, or destruction is the result of willful misconduct or lack of good faith on the part of the Contractor's managerial personnel. * * *</p> <p>(iii) The Contracting Officer has, in writing, revoked the Government's assumption of risk for loss, theft, damage, or destruction, due to a determination under paragraph (g) of this clause that the Contractor's property management practices are inadequate, and/or present an</p>		
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<p>undue risk to the Government, and the Contractor failed to take timely corrective action. If the Contractor can establish by clear and convincing evidence that the loss, theft, damage, or destruction of Government property occurred while the Contractor had adequate property management practices or the loss, theft, damage, or destruction of Government property did not result from the Contractor's failure to maintain adequate property management practices, the Contractor shall not be held liable.</p> <p>(2) The Contractor shall take all reasonable actions necessary to protect the Government property from further loss, theft, damage, or destruction. * * *</p> <p>(3) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss, theft, damage, or destruction of Government property. * * * * *</p> <p>(2) The Contractor shall take all reasonable actions necessary to protect the Government property from further loss, theft, damage, or destruction. * * *</p> <p>(3) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss, theft, damage, or destruction of Government property. * * * * *</p> <p>(i) Equitable adjustment. * * *</p> <p>However, the Government shall not be liable for breach of contract for the</p>		
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<p>following: * * * * *</p> <p>(j) * * * (1) * * * (i) * * *</p> <p>(B) For scrap from other than production or testing the Contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures.).</p> <p>(C) Inventory disposal schedules shall be submitted for all aircraft regardless of condition, flight safety critical aircraft parts, and scrap that--</p> <p>(1) Requires demilitarization; (2) Is a classified item; (3) Is generated from classified items; (4) Contains hazardous materials or hazardous wastes; (5) Contains precious metals that are economically beneficial to recover; or (6) Is dangerous to the public health, safety, or welfare.</p> <p>* * * * *</p> <p>(3) * * * (iii) * * *</p> <p>(E) Precious metals in raw or bulk form; * * * * *</p> <p>(iv) The Contractor shall provide the information required by 52.245-1(f)(1)(iii) along with the following:</p> <p>(A) or special tooling and special test equipment, identify each part number with which the item is used.</p> <p>(B) For work-in-progress, the estimated percentage of completion.</p>		
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<p>(C) For precious metals, the type of metal and estimated weight.</p> <p>(D) For hazardous material or property contaminated with hazardous material, the type of hazardous material.</p> <p>(E) For metals in mill product form, the form, shape, treatment, hardness, temper, specification (commercial or Government) and dimensions (thickness, width and length.)</p> <p>(F) Any additional information that may facilitate understanding of the property's intended use</p> <p>(v) Property with the same description, condition code, and reporting location may be grouped in a single line item.</p> <p>(vi) Scrap should be reported by ``lot" along with metal content, estimated weight and estimated value.</p> <p>* * * * *</p> <p>(8) * * *</p> <p>(ii) The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of Contractor inventory as directed by the Plant Clearance Officer. Unless otherwise directed by the Contracting Officer or by the Plant Clearance Officer, the Contractor shall remove and destroy any Government affixed markings identifying the property as U.S. Government-owned property prior to its disposal.</p> <p>* * *</p> <p>Alternate I (Date). * * *</p> <p>(h)(1) The Contractor assumes the risk of, and shall be responsible for, any loss, theft, damage, or destruction of</p>		
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	Government property upon its delivery to the Contractor as Government-furnished property. * * * * * * * *		
20a	Not Addressed	Amend 52.245-1(f)(1)(iii) (B) as follows: [When approved by the Property Administrator,] [T]he Contractor may maintain, in lieu of formal property records, a file of appropriately cross-referenced documents evidencing receipt, issue, and use of property [material] that is issued for immediate consumption.	Clarification. Approval should not be required as receipt and issue processes are normal industry and government practice when property is purchased outside of an Enterprise Resource Planning (ERP) or Material Management and Accounting System (MMAS). Contractors, as part of normal internal control practices, must maintain adequate records with requirements and approvals of acquisitions. Approval of a receipt and issue is unnecessary, compliance to internal processes and contract requirements is mandatory. Without receipt and issue processes contractors must maintain stockrooms, with unnecessary processes just to record receipt and issue to a given requester. When looking from a “lean” perspective, stockrooms and associated in and out processes are major generators of waste and are eliminated or reduced. Unnecessary approvals or required use of inefficient processes should be eliminated.
20b	Not Addressed	Amend 52.245-1(g)(4) to read as follows: The Government shall have access to the Contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan, systems, procedures,	Clarification. This access includes all contractor site locations and, with the Contractor's consent, subcontractor premises.

		records, and supporting documentation that pertains to Government property. This access includes all site locations and, with the Contractor's consent, all subcontractor premises.	
20c	Not Addressed	Amend 52.245-1(d)(2)(i)(B) by replacing “the acquisition cost” with “fair value”.	<p>Best practices.</p> <p>It is unreasonable to expect contractors to pay acquisition cost for used items. A fair and reasonable price would be fair value – generally a depreciated amount.</p> <p>Requiring acquisition cost has its roots from old policy prior to the Government depreciating assets, based upon recent accounting rules.</p> <p>Generally when contractors purchase property either direct or indirect cost – these costs generally flow back to the Government with additional adders, for example a \$10,000 item the Government owned and the Contractor purchased as a capital equipment, the Government would ultimately pay about \$12,000 to \$14,000 as result of adders (G&A, cost of money and profit). Paying prices beyond fair value is wasteful and counter to good business operations for both the Government and the contractor.</p>
20'	<p>Amend section 52.245-2 by revising the date of the clause, and the first two sentences of paragraph (b) to read as follows:</p> <p>52.245-2 Government Property Installation Operation Services.</p> <p>* * * * *</p> <p>GOVERNMENT PROPERTY</p>	<p>Revise amendment in 52.245-2 by deleting the addition “is lost, stolen, damaged, or” and removing “destroyed” from the current language and replacing LSDD by “is lost.”</p> <p>The revised language should read as follows:</p> <p>(b) The Government bears no responsibility</p>	See comments in line item #5 above.

	<p>INSTALLATION OPERATION SERVICES (DATE)</p> <p>* * * * *</p> <p>(b) The Government bears no responsibility for repair or replacement of any loss, theft, damage, or destruction of Government property. If any or all of the Government property is lost, stolen, damaged, or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. *</p> <p>* *</p> <p>* * * * *</p>	<p>for repair or replacement of any loss, of Government property. If any or all of the Government property is lost, the Contractor shall be responsible for replacement of the property at Contractor expense. *</p>	
21	<p>Amend section 52.245-9 by revising the date of the clause, and the introductory text of paragraph (a); and removing the definitions ``Acquisition cost", ``Government property", ``Plant equipment", and ``Real property". The revised text reads as follows:</p> <p>52.245-9 Use and Charges.</p> <p>* * * * *</p> <p>USE AND CHARGES (DATE)</p> <p>(a) Definitions. Definitions applicable to this contract are provided in the clause at 52.245-1, Government Property. Additional definitions as used in this clause include:</p> <p>* * * * *</p>	Concur.	
23	<p>* * * * *Amend section 52.251-1 by revising the date of the clause, and</p>	Concur.	

	<p>the last sentence of the clause to read as follows:</p> <p>52.251-1 Government Supply Sources.</p> <p>* * * * *</p> <p>GOVERNMENT SUPPLY SOURCES (DATE)</p> <p>* * * The provisions of the clause entitled ``Government Property," at 52.245-1, shall apply to all property acquired under such authorization.</p>		
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Comments on FAR Case 2008-011:

The following language is proposed by the FAR Council in FAR Case 2008-011 as a modification to FAR Section FAR 15.404-4:

15.404-4 Profit.

Language was added to FAR 15.404-4(a)(3) as follows-- ``Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property."

Invocon objects to this proposed language because it creates an onerous tracking burden upon contractors, especially those small businesses engaged in research and/or development programs. As this language reads, it seems to only allow a contractor to be entitled to fee on material used in a deliverable. In purchasing materials, vendors and/or manufacturers often have minimum required quantities before they will accept an order. For example, in order to buy a certain type of resistor, a contractor must buy say, 500 resistors because that is what the distributor/manufacturer requires. However, it may use only 252 in the building of the deliverables. Of the 500, some may be rendered inoperative, some may be faulty, some may be lost during the manufacturing process. However, the contractor can only get fee on the items that were used to make the deliverable; even though it had to buy 500 to obtain even one. This does not seem equitable given that Contractors must meet minimum quantities to order.

Given the iterative process of design and testing of deliverables for R&D programs or even non-COTS manufacturing projects, it would be very onerous to track the items that went into each and every deliverable. This would only increase costs to the program due to the additional administrative tracking that would have to occur. The fee "saved" by the government would be lost in increased costs of performance of the program due to the additional tracking for some items that are not financially material to the project such as 1 and 2- cent resistors. This kind of recording burden works as a disincentive to Contractors and would appear to increase the government's costs over the life of the program.

Additionally, under this proposed language, it would appear as though the fee could not be collected until a deliverable is finished due to the implied tracking requirement of exactly what materials went into the deliverable. It would seem that fee is being withheld until deliverables are finalized. In a situation where the government is requesting an iterative build process including an engineering design unit (for feasibility demonstration), qualification unit, and then acceptance unit; the definition of what constitutes a deliverable could vary multiple times within the same program.

As it stands now, Contractors simply book material purchases, labor, travel and other materials to their books and assess fee and invoice accordingly. With this proposed language, Contractors would have to create another level of tracking with respect to materials purchased and separate out materials used for a deliverable. This will also add another level of complexity to and increase the cost of the audit process as DCAA personnel would have to be able to review extensive bills of materials (BOMs) to confirm what items actually went into the deliverables and then match those BOMs to the accounting records instead of simply having the contractor prove up the purchases with material receipts and job cost records as they do now.

For the reasons stated above, we respectfully request that the proposed revision to FAR 15.404-4 be abandoned.



OCT 06 2009

MEMORANDUM FOR LINDA NEILSON
DEPUTY DIRECTOR
DEFENSE PROCUREMENT

THRU: AL MATERA
DIRECTOR
ACQUISITION POLICY DIVISION

FROM: (b) (6)
SUPERVISOR
REGULATORY SECRETARIAT

SUBJECT: FAR Case 2008-011, Government Property

Attached are comments received on the subject FAR case published at 74 FR 39262, August 6, 2009. The comment closing date was October 5, 2009.

<u>Response Number</u>	<u>Date Received</u>	<u>Commenter</u>	<u>Organization</u>
2008-011-1	08/11/09	Ronald C. Wesley	US Navy
2008-011-2	08/14/09	(b) (6)	Northern Electric, Inc.
2008-011-3	08/14/09		
2008-011-4	08/21/09		Ball Aerospace & Technologies Corp.
2008-011-5	08/31/09		
2008-011-6	09/14/09		ITT
2008-011-7	09/23/09		
2008-011-8	09/25/09		
2008-011-9	09/30/09		Larkins Consulting & Training

<u>Response Number</u>	<u>Date Received</u>	<u>Commenter</u>	<u>Organization</u>
2008-011-10	09/30/09	(b) (6)	National Guard Bureau – PARC Office
2008-011-11	10/02/09	Douglas Goetz	Defense Acquisition University
2008-011-12	10/05/09	(b) (6)	National Defense Industrial Assoc.
2008-011-13	10/05/09	(b) (6)	Council of Defense & Space Industry Assoc.
2008-011-14	10/05/09	Cheryl Howe	HHS
2008-011-15	10/05/09	(b) (6)	INVOCON, Inc.
2008-011-16	10/02/09	(b) (6)	Orbital Sciences Corp.

Attachments

PUBLIC SUBMISSION

As of: September 24, 2009
Received: August 11, 2009
Status: Pending_Post
Tracking No. 80a05aec
Comments Due: October 05, 2009
Submission Type: Web

Docket: FAR-2009-0029
FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0001
Comment on FR Doc # E9-18799

Submitter Information

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Phone: 202 6855042
Fax: 202 6855411
Organization: Military Sealift Command
Government Agency Type: Federal
Government Agency: USN

General Comment

FAR Case 2008-11

Comments:

(1) Under the proposed changes include the following:

item (15) Loss, Damage, Theft, or Destruction -

All references to "loss, damage, destruction, or theft" are changed to "loss, theft, damage, destruction" in the coverage in 32.503-16(a) and 32.1010(a) and the clauses at 52.232-32 and 52.245-1.

PART 32--CONTRACT FINANCING

5. Amend section 32.503-16 by removing from paragraph (a) "loss, theft, destruction, or damage to" and adding "lost, stolen, damaged, or destroyed" in its place.

6. Amend section 32.1010 by removing from paragraph (a) "loss, theft, destruction, or damage to" and adding "lost, stolen, damaged, or destroyed" in its place.

This is inconsistent and probably a typographical error. Item 15 states one thing and the amendments state something different.

4.705-3 Acquisition and supply records

(h) Property records (see 45.101 and 52.245-1): retain 4 years.

Four (4) years after completion of contract, final payment, final contract award payment or something specific to aid in clarification.

PUBLIC SUBMISSION

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Tracking No. 80a0969a
Comments Due: October 05, 2009
Submission Type: Web

Docket: FAR-2009-0029
FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0002
Comment on FR Doc # E9-18799

Submitter Information

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Organization: Northern Electric, Inc
Government Agency Type: State
Government Agency: State of Colorado

General Comment

As an open shop electrical contractor, we are opposed to FAR 2009-005. We feel it is very unfair to have federal funds allocated to projects that have a POA on them.

We feel that this takes away better pricing opportunities that often time's open shop contractors can offer on federal projects and it would limit which projects open merit shop contractors can bid on.

As an open shop contractor, we would never offer a price for any projects that have a POA on it.

PUBLIC SUBMISSION

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Docket: FAR-2009-0029
FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0003
Comment on FR Doc # E9-18799

Submitter Information

Name: (b) (6)
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33000 Nixie Way
San Diego, CA, 92147
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General Comment

I am writing concerning the proposed language at FAR 15.404-4(a)(3). The proposed language reads as follows:

"Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property."

I am concerned that this language will perpetuate a common misconception that profit or fee is "permitted" or "allowed" on this or that cost, as if it were an indirect cost being allocated to a cost objective. Profit or fee is simply the difference between the contract price and cost. Although the Government develops its prenegotiation profit or fee objectives based on its prenegotiation cost objective amounts, that does not mean that profit or fee is necessarily a function of cost. Once profit or fee is negotiated and a contract is awarded, it is not necessarily paid or based on the incurrence of this or that cost.

I suggest that the proposed language be removed from 15.404-4(a)(3) and, instead, new language be included in FAR 15.404-4(c)(3) that instructs contracting officers to exclude the cost of contractor-acquired property from prenegotiation cost objectives when calculating the Government's prenegotiation profit or fee objective, unless the contractor-acquired property is a deliverable under the contract.

(b) (6)

Professor of Contract Management
Defense Acquisition University

PUBLIC SUBMISSION

As of: September 24, 2009
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Docket: FAR-2009-0029
FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0004
Comment on FR Doc # E9-18799

Submitter Information

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Email: (b) (6)@ball.com

Phone: 303-939-5680

Fax: 303-939-4999

Organization: Ball Aerospace & Technologies Corp.

General Comment

Please consider the attached comments regarding FAR Case 2008-011

Attachments

FAR-2009-0029-DRAFT-0004.1: Comment on FR Doc # E9-18799

FAR Case 2008-011

As a result of the Ad Hoc team recommendations, FAR case 2008-011 was established to address the recommendations.

One of their proposed changes includes the following:

(16) Clauses.

52.245-1 Government Property.

(F) Paragraphs (f) (1) (iii) (A) (4) and (f) (1) (vi) (B) (4) “Unique-item” identifier was revised to “Item unique” identifier.

Suggest the Ad Hoc team reconsider the change and amend it as follows:

(16) Clauses

52.245-1 Government Property.

(F) Paragraphs (f)(1)(iii)(A)(4) and (f)(1)(vi)(B)(4) “Unique-item” identifier was revised to “Unique Item Identifier as prescribed by DFARS 252.211-7007, Reporting of Government-Furnished Equipment in the DoD Item Unique Identification (IUID) Registry”

Justification:

Within DFARS 252.211-7007 the below definition can be found. The specific 52.245-1 clause paragraphs (f) (1) (iii) (A) (4) and (f) (1) (vi) (B) (4) are regarding the “Unique Item Identifier” and not the “Item Unique Identifier”. I could not find a “Key Term” within the FAR or its supplements for “Item Unique Identifier” when performing a power search of the FAR web site located at <http://farsite.hill.af.mil/>. I believe that based on the definitions the key term should remain as “Unique Item Identifier (UII)”. IUID refers to a system of assigning, reporting, and marking DOD property. And UII refers marked (UII) and unmarked (Virtual UII) either marked or assigned to an item to distinguish an item from all other like and unlike items in order to provide traceability of the items throughout their total life cycle.

From DFARS 252.211-7007:

Definitions:

“Item unique identification (IUID)” means a system of assigning, reporting, and marking DoD property with unique item identifiers that have machine-readable data elements to distinguish an item from all other like and unlike items.

“Unique item identifier (UII)” means a set of data elements permanently marked on an item that is globally unique and unambiguous and never changes, in order to provide traceability of the item throughout its total life cycle.

“Virtual UII” means the UII data elements assigned to an item that is not marked with a DoD compliant 2D data matrix symbol, e.g., enterprise identifier, part number, and serial number; or the enterprise identifier along with the Contractor’s property internal identification, i.e., tag number.

PUBLIC SUBMISSION

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Docket: FAR-2009-0029
FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0005
Comment on FR Doc # E9-18799

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General Comment

With respect to the following:

"15.404-4 Profit.

(a) * * *

(3) * * * Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property.

* * * * *

What does that mean? To whom is it directed?

When you say "permitted," do you mean permitted for the purpose of developing a prenegotiation profit or fee objective? Or do you mean it in some other sense?

Do you mean that when using material acquisition as a profit analysis factor under FAR 15.404-4 (d)(1)(i)(A), contracting officers may not consider the acquisition of property that will not itself be a deliverable end item?

Do you mean that contractors may not calculate their profit objective on a cost base that includes the cost of property that is not a deliverable?

In what sense is profit or fee "permitted on" cost? Permitted in what sense.

The new sentence is obscure as written. Tacking it on to FAR 15.404-4(a)(3) increases its obscurity.

What is it that you are trying to do?

PUBLIC SUBMISSION

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Submission Type: Web

Docket: FAR-2009-0029
FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0006
Comment on FR Doc # E9-18799

Submitter Information

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Organization: ITT

General Comment

PART 15--CONTRACTING BY NEGOTIATION

Draft Change:

4. Amend section 15.404-4 by adding a sentence to the end of paragraph (a)(3) to read as follows:

15.404-4 Profit.

(a) * * *

(3) * * * Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property.

Recommendation:

Remove -- (3) * * * Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property.

Discussion:

In the case of material and property purchased on a Cost type contract the proposed change is

contradictory to the Government's stated position of paying a fair and reasonable fee on work performed for the Government. The Government would likely see a change in Contractor accounting practices that would strip out labor to manufacture an item (fee bearing) vs the base material in the item (non fee bearing under the proposed rule change). This practice would result in the Government and the Contractor incurring a significantly larger administrative burden than the current practices and ultimately resulting in increased cost to the Government for procurements.

PUBLIC SUBMISSION

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Submission Type: Web

Docket: FAR-2009-0029
FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0007
Comment on FR Doc # E9-18799

Submitter Information

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Email: (b) (6) @gmail.com

General Comment

Ms. Flowers,
Please see attachment for my comment.

Sincerely,

(b) (6)

Attachments

FAR-2009-0029-DRAFT-0007.1: Comment on FR Doc # E9-18799

September 23, 2009

General Services Administration
Regulatory Secretariat (VPR)
1800 F Street, N.W., Room 4041
ATTN: Hada Flowers
Washington, D.C. 20405

Re: FAR Case 2008-011; Government Property

Dear Ms. Flowers:

I would like to thank you for the opportunity to comment on the proposed rule announced on August 6, 2009 to amend the use of government property in possession of federal contractors under the Federal Acquisition Regulation (FAR).

My concern lies with proposed rule 15.404-4. The new regulation would prevent a contractor from profiting on the cost of contractor acquired property; the rationale being that the contractor already receives a benefit by being able to retain the property post-contract and that if the contractor retains title to the property it will not charge rent. It has not been established, however, what type, if any, benefit the contractor receives from keeping the property. It has also not been established that the benefit outweighs the costs that the contractor must incur to keep the property intact and operating, as well as the costs associated with storing and performing yearly accounting. Moreover, the property, such as special tooling and special test equipment, may not benefit the contractor at all if it becomes obsolete after the completion of the contract.

Regardless of any benefit received by the contractor, being equitable does not mean preventing profit. Zero profit fails to account for the contractor incurred risks in acquiring the property and in the effort to purchase the property, just like in any other part of the contract. Further, having these no profit items would create an accounting nightmare. There will be defective pricing issues, required auditing to ensure the zero profit, and a variety of other burdens that are really unnecessary.

A better approach would be for the contracting officer to take the value of the contractor acquired property in consideration when negotiating profits. To do this would only require that the contractor set out the value of these assets and address the value in the proposal.

Additionally, the weighted guidelines could be changed to include a section to address the value of contractor acquired property. Then, the profit range could encompass positive, negative, or neutral profits depending on the value to the contractor. This would take into account that the retention of the contractor acquired property can be a burden to the contractor. Implementing this change in the weighted guidelines would reduce the hassle associated with this provision by simply rolling it up into the total profit.

Thought should also be given to the retention of the contractor acquired property to the total value of the contract. If the contractor acquired property is less than 1% of the contract value, then the requirement for addressing the value should be eliminated.

PUBLIC SUBMISSION

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Docket: FAR-2009-0029
FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0008
Comment on FR Doc # E9-18799

Submitter Information

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Houston, TX, 77025

General Comment

Reference 52.245-1, (f)(1)(viii)(B), "property" was replaced with "material". Is it safe to assume equipment is never placed in a location where it could be commingled? To support Gov programs, we could have (1) backup critical spares support equipment in the warehouse or (2) we might temporarily store like Gov and company equipment in the same location. I realize the frequency of this situation of physically commingling equipment would be limited, but why ignore that possibility and not apply the same rule as for materials? You could certainly have that situation for equipment if a storage "location" is physically large enough to place multiple items.

Special Test Equipment in order to install them on other Government equipment.

2008-011-10

PUBLIC SUBMISSION

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FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0010
Comment on FR Doc # E9-18799

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Organization: Natl. Guard Bureau - PARC Office
Government Agency Type: Federal
Government Agency: DOD

General Comment

In FAR 45.101, the definition of "Real property" reads, "See Federal Management Regulation 102-71.20 (41 CFR 102-71.20)."

It would be helpful if FAR 45.101 showed a website for 41 CFR 102-71.20. This would make it much easier to access the definition of "real property".***

I recommend revision of 45.107(a)(1) and/or the definitions in 45.101 and/or the FAR matrix to clarify the situations in which the clause 52.245-1, Government Property (and by extension, the clause 52.245-9, Use and Charges), is to be included in certain types of solicitations and contracts.

It is not currently clear from the FAR text whether or not the clauses 52.245-1 and 52.245-9 should be included in the following types of fixed-price contracts:

- construction contracts performed on Government installations
- architect-engineering (A-E) contracts performed on Government installations
- food service contracts and dining facility management contracts performed on Government installations
- custodial service contracts performed on Government installations
- groundskeeping contracts (lawn-mowing, tree-trimming, snow or trash removal, etc.) performed on Government installations

Based on the current and proposed FAR texts, one would conclude that the clauses 52.245-1 and 52.245-9 should be included in all of the above types of contracts based the following line of reasoning:

1. FAR 45.107(a)(1)(ii) says that 52.245-1 is to be inserted in all fixed-price solicitations and contracts when the Government will provide Government property. (The proposed rule does not change any of the current text of FAR 45.107.)

2. The proposed FAR definitions are as follows:

a. The definitions of "Government Furnished Property" and "Government Property - words that appear in the proposed FAR text, but not in the current FAR text are in upper-case letters - are respectively as follows:

"Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract. GOVERNMENT-FURNISHED PROPERTY INCLUDES SPARES AND PROPERTY FURNISHED FOR REPAIR, MAINTENANCE, OVERHAUL, OR MODIFICATION.

Government property means all property owned or leased by the Government. Government property includes both Government-furnished property and contractor-acquired property. GOVERNMENT PROPERTY INCLUDES MATERIAL, EQUIPMENT, SPECIAL TOOLING, SPECIAL TEST EQUIPMENT, AND **REAL PROPERTY** [emphasis added]. GOVERNMENT PROPERTY DOES NOT INCLUDE INTELLECTUAL PROPERTY, AND SOFTWARE."

b. The definition of "Property" (unchanged by the proposed FAR change) is:

"'Property' means all tangible property, both real and personal.

c. The definition of "Real Property" in Federal Management Regulation 102-71.20 (41 CFR 102-71.20.), as referenced in the proposed FAR change, is "Any interest in land, together with the improvements, structures, and fixtures located thereon... and appurtenances thereto, under the control of any Federal agency" other than the exceptions listed in paragraphs (1)(i) - (1)(v) of the definition of "Real Property".

(The current FAR definition of "Real Property" is: "lands and rights in land, ground improvements,...and buildings and other structures.")

3. The current definition of "property" includes "real property". Therefore, one could reasonably conclude that the current definition of "Government property" includes "real property".

If the proposed definition of "Government property" is adopted, the definition of "Government property" will explicitly include "real property".

Since "real property" includes both land and buildings, according to both the current and proposed definitions,

a. For construction contracts, the Government is either providing the land on which the contractor is to construct a building, or a building which the contractor is to alter. In both cases, according to the FAR definitions of "Government-furnished property", "Government property"*, "Property" and "Real Property" the Government is furnishing property to the contractor. Furthermore, in the case of a building which the contractor is to alter, the Government is furnishing property for MODIFICATION, and is therefore providing "Government-furnished property" as that term will be defined if the proposed language is adopted.

*The current FAR language strongly implies that the Government is furnishing "Government property" to the contractor. The proposed FAR language explicitly says so.

Therefore, the clauses 52.245-1 and 52.245-9 should be included in solicitations and contracts for construction.

b. For A-E contracts, the Government is providing the land to be measured and surveyed, and possibly from which soil and water samples are to be taken, so that the A-E firm can prepare the drawings and specifications for a construction project. The Government is thus providing the contractor property that is in the Government's possession and is "furnish[ing that property] to the contractor for performance of a contract." The Government is thereby providing "Government-furnished property" as that term is defined. This is true for both the current and proposed definitions of "Government-furnished property".

Therefore, the clauses 52.245-1 and 52.245-9 should be included in solicitations and contracts for A-E services.

c. For food service and dining facility management contracts, the Government is providing the room or building in which the food is to be served, and is providing the stoves, sinks, refrigerators, serving counters, etc. for the contractor's use in performing the contract. The Government is thus providing the contractor property that is in the Government's possession and is "furnish[ing that property] to the contractor for performance of a contract." The Government is thereby providing "Government-furnished property" as that term is defined. This is true for both the current and proposed definitions of "Government-furnished property".

Therefore, the clauses 52.245-1 and 52.245-9 should be included in solicitations and contracts for food service.

(In a telephone conversation with Mark Gomersall and Tom Ruckdaschel on Thursday, 01 October 2009, they said that 52.245-1 (and by extension, 52.245-9) SHOULD be included in solicitations and contracts for food service. However, Tom Ruckdaschel indicated to me in an e-mail on 05/05/2009 that these clauses should NOT be included in such solicitations and contracts. (See text of e-mail below, beginning on page 6 of this document.))

d. For contracts for custodial services, the Government is providing the building which is to be cleaned. The Government is thus providing the contractor property that is in the Government's possession and is furnishing that property to the contractor for performance of the contract, specifically, for MAINTENANCE. The Government is thereby providing "Government-furnished property", especially as that term will be defined if the proposed language is adopted.

Therefore, the clauses 52.245-1 and 52.245-9 should be included in solicitations and contracts for food service.

e. For contracts for groundskeeping services, the Government is providing the piece of land on which is located the grass to be mowed, the trees to be trimmed, or the snow or the trash to be removed. As for custodial service, the Government is thus providing the contractor property that is in the Government's possession and furnishing that property to the contractor for performance of the contract, specifically, for MAINTENANCE. The Government is thereby providing "Government-furnished property", especially as that term will be defined if the proposed language is adopted.

Therefore, the clauses 52.245-1 and 52.245-9 should be included in solicitations and contracts for groundskeeping.

(In a telephone conversation with Mark Gomersall and Tom Ruckdaschel on Thursday, 01 October 2009, they said that 52.245-1 (and by extension,

52.245-9) should NOT be included in solicitations and contracts for groundskeeping.)

4. The FAR matrix indicates that 52.245-1 and 52.245-9 is "Required when Applicable" to ALL types of contracts - including construction, A-E, and service - except those for commercial items.

Bottom line:

1. If the clauses 52.245-1 and 52.245-9 ARE applicable to any or all of the five above-listed types of contracts, it would be very helpful if the FAR either explicitly indicated that such is the case, or provided information by which could easily infer that such is the case. That way, when preparing solicitations, contract specialists/contracting officers would not have to go through the above-described lengthy thought process to determine that one those two clauses are indeed applicable.

2. If the clauses 52.245-1 and 52.245-9 are INapplicable to one or more of the five above-listed types of contracts, it would be very helpful if the FAR either explicitly indicated that such is the case, or provided information by which could easily infer that such is the case. That would preclude a contract specialist/contracting officer from falsely concluding, based on the above-described thought process, that those two clauses are applicable, when in fact, they are not.

Other issues:

1. 45.107(a)(1)(i) currently states that that 52.245-1 is to be inserted in "ALL [emphasis added] cost reimbursement, time-and-material, and labor-hour type solicitations and contracts".

The proposed FAR change does not revise this text.

I recommend revising this text to indicate either that:

- 52.245-1 is to be included in cost reimbursement (CR), time-and-material (T&M), and labor-hour (L-H) type solicitations and contracts for which Government property will or might be furnished, OR
- 52.245-1 is to be included in CR, T&M, and L-H type solicitations and contracts unless no Government property will be furnished,

instead of in ALL CR, T&M, and L-H type solicitations and contracts.

Suppose a contractor were issued a CR, T&M or L-H contract for consultant services, and the contractor did all the work required by the contract at its own facility, using only its own property. In such a case, no Government property would be furnished. For such a contract, why would it be necessary to include 52.245-1 (and by extension, 52.245-9)?

The current text of FAR 45.107(a)(i) requires inclusion of a clause whose applicability to such a contract is highly questionable.

2. The last sentence of the proposed definition of "Government property" reads, " Government property does not include intellectual property, and software."

That sentence would be clearer, and more grammatically correct, if it were re-worded as follows:

"Government property does not include intellectual property [delete comma] or [not "and"] software."

("Government property does not include intellectual property or software.")

Alternatively, that sentence could be re-worded to read,

"Government property includes neither intellectual property nor software."

From: Ruckdaschel, Tom [mailto:Tom.Ruckdaschel@dcma.mil]
Sent: Tuesday, May 05, 2009 7:59 AM
To: Rubinstein, Judith S Ms. CIV NG NGB ARNG
Subject: RE: Class Deviation 2007-00012 - Should solicitations/contracts for construction include the FAR version of 52.245-1 or 52. 52.245-1 (UNCLASSIFIED)

Judith

It's not so much the "type" of contract that is at issue. Rather...it's whether GP is to be furnished or acquired.
If no, then the GP clause need not be included; if yes, then the GP clause should be included.

In the case you mention whereby the Govt provides the stoves, refrigerators, etc., for the contractor to USE (emphasis added), such items are not considered Govt Furnished Property in the context of the GP clause.

When the contract place-of-performance is on a Government site or installation -- where contractor personnel are to be located--and the property to be provided is for the contractor to USE (emphasis added). For example ovens, stoves, desks, chairs, telephones, computers, fax machines, etc.

Such items are not considered GP in the context of the FAR clause. Reason being, the GP is accountable to the Government as it is on a Government installation. Accordingly, the clause should not be used in such cases.

We have a FAR case that will hit the street later this year to make some corrections/edits/improvements to the property requirements. I'm going to take a shot at making the edits you suggest. Glad this came up--I will keep in touch.

Note...the "FAR protocol" on definitions is that---if the definition is used in only one Part, then the definition should be stated in that part. If the definition is used more than place (personal property) then it goes in FAR Part 2.

Tom

-----Original Message-----

From: (b) (6) CIV NG NGB ARNG
[mailto:(b) (6)@us.army.mil]
Sent: Monday, May 04, 2009 5:51 PM
To: (b) (6)
Subject: RE: Class Deviation 2007-00012 - Should solicitations/contracts for construction include the FAR version of 52.245-1 or 52. 52.245-1 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

Thank you for the clarification.

Two more questions:

1. Based on your clarification, I infer that 52.245-1 would NOT be included in the following types of contracts (if they are firm-fixed-price), unless the Government provides personal property:

- architect-engineering contracts
- contracts for custodial services
- contracts for grounds-keeping services

>>Please verify that my inference is correct.

2. Would 52.245-1 be included in a firm-fixed-price contract for dining facility management, or a firm-fixed-price contract for food service performed in a Government facility?

In such contracts, the Government often provides the stoves, refrigerators, sinks, serving counters, etc. for the contractor's use for the preparation, storage, and serving of food, and clean-up thereafter. (I suppose that one could argue that such fixtures are part of the building, and therefore, are to be considered real property, not personal property, thus rendering 52.245-1 inapplicable to such contracts.)

A thought:

Clarification of the FAR prescription for use of 52.245-1 in construction contracts (and some types of service contracts) could be accomplished as follows:

- I. Revising FAR 45.107(a)(1)(ii) to read,
"(ii) Fixed-price solicitations and contracts when the Government will provide Government property other than real property."
- II. Possibly revising the FAR matrix to indicate that 52.245-1 (basic clause and Alternate I) are not applicable to construction contracts.
- III. The definition of "personal property" does not appear in FAR 45.101. It does appear in FAR 2.101. I think that the definition of "personal property" should be moved from 2.101 to 45.101.

(b) (6)

National Guard Bureau
NGB-ZC-PARC
(703) 607-1020
DSN 327-1020

-----Original Message-----

From: (b) (6) [REDACTED]@dcma.mil]
Sent: Monday, May 04, 2009 1:07 PM
To: (b) (6) [REDACTED] OSD-ATL; (b) (6) [REDACTED] CIV NG NGB
ARNG
Cc: (b) (6) [REDACTED] OSD-ATL; (b) (6) [REDACTED] OSD ATL; (b) (6) [REDACTED]
(b) (6) [REDACTED], OSD-ATL; (b) (6) [REDACTED] OSD-ATL
Subject: RE: Class Deviation 2007-00012 - Should solicitations/contracts
for construction include the FAR version of 52.245-1 or 52. 52.245-1
(UNCLASSIFIED)

I don't normally do this, but I wish to "revise and extend my remarks."

It occurred to me whilst running on the treadmill that construction
contracts are strictly fixed price.
That said, there is no contractor acquired property involved. So...

Bottom line: As long the construction solicitation/contract does not in
any way involve personal property to be furnished to the offer/contractor,
then...no...the solicitation/contract does not require the GP Clause
52.245-1

-this notwithstanding the fact that the FAR definition of GP includes real
property

Sorry for any confusion.

A great question, however. And I do think the FAR could be clearer on
this point---and will work toward a possible revision.

Tom

-----Original Message-----

From: (b) (6) [REDACTED]@osd.mil]
Sent: Monday, May 04, 2009 11:44 AM
To: (b) (6) [REDACTED] CIV NG NGB ARNG
Cc: (b) (6) [REDACTED] OSD-ATL; (b) (6) [REDACTED] OSD
ATL; (b) (6) [REDACTED] OSD-ATL; (b) (6) [REDACTED] Mr, OSD-ATL
Subject: RE: Class Deviation 2007-00012 - Should solicitations/contracts
for construction include the FAR version of 52.245-1 or 52. 52.245-1
(UNCLASSIFIED)

Judith,

Tom Ruckdaschel is the one who worked these and his response is below.
Feel free to contact him directly. I've also copied Lora Muchmore and
Craig Adams who handle real property policy for the department.

Rob

-----Original Message-----

From: (b) (6)
Sent: Monday, May 04, 2009 10:37 AM
To: (b) (6) OSD ATL
Cc: (b) (6) OSD-ATL; (b) (6) OSD-ATL
Subject: RE: Class Deviation 2007-00012 - Should solicitations/contracts for construction include the FAR version of 52.245-1 or 52. 52.245-1 (UNCLASSIFIED)

My gosh...someone is reading the contract.

The short answer is yes, the solicitation should include 52.245-1 as required by FAR Part 45.104 (does not exclude construction contracts).

I don't see the "ambiguity" in applying the Class Deviation (CD) and Alternate I of the clause. The CD 2007-00012 deletes the term "plant equipment" from the definition of real property- [the term plant equipment is no longer used.

The CD applies to the clause, and by extension, to Alternate 1. The Alternate I changes only the liability requirements.

Two different things--not at odds with each other.

Feel free to pass her my way if needed

(b) (6)

DCMA
703-428-0994

-----Original Message-----

From: (b) (6) OSD ATL [mailto:(b) (6)@osd.mil]
Sent: Monday, May 04, 2009 10:10 AM
To: (b) (6)
Cc: (b) (6) OSD-ATL; (b) (6) OSD-ATL
Subject: FW: Class Deviation 2007-00012 - Should solicitations/contracts for construction include the FAR version of 52.245-1 or 52. 52.245-1 (UNCLASSIFIED)

Tom,

Thoughts?

-----Original Message-----

From: (b) (6) OSD-ATL
Sent: Monday, May 04, 2009 7:24 AM
To: (b) (6) OSD-ATL; (b) (6) OSD ATL

Subject: Re: Class Deviation 2007-00012 - Should solicitations/contracts for construction include the FAR version of 52.245-1 or 52. 52.245-1 (UNCLASSIFIED)

(b) (6)

Looks like a "real property" questions to me. Suggest they contact Craig Adams who supports Lora Muchmore.
Craig.Adams@osd.mil

(b) (6)

(703) 602-8019

Sent from my BlackBerry Wireless Handheld

----- Original Message -----

From: (b) (6), OSD-ATL
To: (b) (6) OSD ATL; (b) (6) OSD-ATL
Sent: Sat May 02 13:48:15 2009
Subject: FW: Class Deviation 2007-00012 - Should solicitations/contracts for construction include the FAR version of 52.245-1 or 52. 52.245-1 (UNCLASSIFIED)

I think she might be confusing real property here. Your thoughts?

-----Original Message-----

From: (b) (6) S Ms. CIV NG NGB ARNG
Sent: Thursday, April 30, 2009 5:10 PM
To: (b) (6) OSD-ATL
Subject: Class Deviation 2007-00012 - Should solicitations/contracts for construction include the FAR version of 52.245-1 or 52. 52.245-1 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

I am a procurement analyst with the National Guard Bureau.

Class Deviation 2007-00012 (Dec 21, 2007), Class Deviation from FAR Parts 45 and 52, says to direct questions to (b) (6)
I got your voice mail at that phone number. If you are not the person to whom my questions should be directed, please forward this e-mail to the appropriate person/people.

CD 2007-00012 says to use 52.245-1 DEV, Government Property (DEVIATION) in solicitations where "real property" is addressed.

QUESTIONS:

1. Should construction solicitations include the FAR version of 52.245-1, or 52.245-1 (DEVIATION)?

Construction contracts take place on "real property", so I interpret CD 2007-00012 to mean that 52.245-1 (DEVIATION) should be used in preference to the FAR version of 52.245-1 in construction solicitations and contracts.

However, I want to verify that my interpretation is correct.

2. Should 52.245-1 be included in solicitations and contracts for construction at all?

45.107(a)(1)(ii) says to include 52.245-1 in fixed price solicitations and contracts when the Government will provide Government property. 45.101 says that "Government property" includes "real property". Since the Government furnishes the construction contractor the real property upon which the construction project will take place, I interpret FAR Subpart 45.1 to mean that 52.245-1 should be included in construction contracts. Also, the FAR matrix indicates that 52.245-1 is applicable to construction contracts.

Please confirm whether or not 52.245-1 should be included in construction contracts.

As a corollary, the above two questions also apply to many services performed on Government installations, such as managing dining facilities, custodial services, and grounds-keeping. For those types of contracts, the Government is respectively providing the contractor the dining hall to be managed; or the building to be cleaned; or the land to be mowed, be cleaned of trash, or receive other maintenance.

3. 52.245-1 Alternate I (as opposed to the basic clause 52.245-1) is the appropriate version of 52.245-1 for the majority of contracts issued by the National Guard. (Most of our contracts are firm-fixed-price and are NOT awarded on the basis of submission of cost or pricing data.)

If 52.245-1 should be included in construction/service contracts, and if construction/service contracts should include 52.245-1 (DEVIATION), rather than the FAR version of 52.245-1, how should 52.245-1 Alt. I be incorporated in construction/service solicitations and contracts?

CD 2007-00012 only has a DEVIATION for the basic clause, not for Alt. I or Alt. II.

Should solicitations and contracts include basic clause 52.245-1 (DEVIATION) and the FAR version of 52.245-1 Alt. I?

If yes, would that create an ambiguity? (The text of paragraph (h)(1) of the clause is different for the basic clause 52.245-1 and 52.245-1 Alt. I. Would there be an ambiguity as to which version of paragraph (h)(1) is applicable?)

If inclusion of 52.245-1 (DEVIATION) is required for construction/service contracts, how should 52.245-1 Alt. I be incorporated into the contracts, if not as described above?

Your guidance on the above issues will be much appreciated.

I will be out of the office on Friday, 01 May 2009.

(b) (6)

National Guard Bureau
NGB-ZC-PARC
(703) 607-1020
DSN 327-1020

2008-011-11

PUBLIC SUBMISSION

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FAR Case 2008-011; Government Property

Comment On: FAR-2009-0029-0001
Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0011
Comment on FR Doc # E9-18799

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Government Agency Type: Federal
Government Agency: DOD

General Comment

The Rewrite of FAR Part 45 and its associated clauses took a quantum leap in improving the world of Government Property. And yet, even with all of the eyes and comments on the original rule – numerous technical issues were missed. MY effort in submitting these comments was to address these technical issues.
Thank you for this opportunity.

Respectfully submitted,
(b) (6) CPPM, CF
Professor of Contract and Property Management

Attachments

FAR-2009-0029-DRAFT-0011.1: Comment on FR Doc # E9-18799

Recommended Changes to the FAR Government Property Policy and Clauses
Submitted by Dr. Douglas N. Goetz

The Rewrite of FAR Part 45 and its associated clauses took a quantum leap in improving the world of Government Property. And yet, even with all of the eyes and comments of the original rule – numerous technical issues were missed. MY effort in submitting these comments was to address these technical issues.
Thank you for this opportunity.

Respectfully submitted,

(b) (6) CPPM, CF
Professor of Contract and Property Management

1. FAR 45.101. There is a technical concern that was attempted to be resolved through the exclusion of intangible property under the definition of "Property" under FAR 45.101 and 52.245-1(a). Technically this exclusion remains buried to the casual observer. To assist in clarifying this issue it is recommended that an additional paragraph be added to FAR 45.102.

Recommendation: Insert the following language into a new subparagraph (e) under FAR 45.102. "Intangible property, e.g., intellectual property, software, etc., are not subject to this requirements of this FAR part or the Government property clauses found at 52.245."

2. FAR 45.201(c)(4)

Professor Waszczak has crafted a provision to address these requirements – rather than requiring each procuring/buying command to muddle through the process of developing their own. Recommend that you give serious consideration to this submission by Professor Waszczak.

3. FAR 52.245-1 (f)(vii) entitled "Relief of Responsibility"

- i. Comments: Though this paragraph is in the Contractor Plans and System paragraph discussing "Outcomes" it, in point of fact, is more of a policy statement. There is no process or action embedded in it. It tells the contractor three situations where they may be granted relief of stewardship responsibility. Nowhere does it mandate an outcome and therefore is inappropriately placed in the clause.
- ii. In addition the term "Relief of Responsibility" has caused some technical confusion. Yes, one can attempt to argue that "responsibility" and "liability" may be construed as the same, but from a legalistic and certainty of terms situation we should be clear and consistent. If we retain the word "responsibility" there is an argument that FURTHER action may be required on the part of the Contracting Officer to address the liability of the contractor, i.e., the Property Administrator has the authority to grant "relief of responsibility" while the Contracting officer has the authority to determine "Liability." This is not just an academic discussion but this issue

has been raised by both Contracting Officers and Legal counsel. If the two words ARE to mean different things – then it is critical that this difference be described in FAR Part 45 and the clause to clarify the use of each.

Recommendations:

Three options:

- i. This paragraph should be moved the FAR Part 45 as a policy statement under FAR 45.104.
- ii. This paragraph should be moved to Paragraph (h) and become the new item 1 with the other paragraphs slipping down one number as well as being duplicated as a policy statement under FAR 45.104.
- iii. The word “responsibility” should be replaced with “liability” to achieve consistent application and interpretation

4. In the previous comment I discussed the Relief of Stewardship Paragraph (f)(vii) of the GP clause.

- i. This paragraph needs a replacement to address the issue of “Relief of Liability.” [Note once again the term “Responsibility” should be replaced with Liability.] There is still a requirement to address the OUTCOME of loss, theft, damage or destruction which is missing from the “Relief” process and outcome but is found under the “Reports” process and outcome.

Recommendations:

- i. Suggested wording – (vii) Relief of Liability. The Contractor shall have a process to enable the prompt disclosure and reporting of all instances of loss, theft, damage and destruction of Government property, including Government property in the possession of subcontractors.
- ii. Second correction – Move all of 52.245-1(f)(vi)((A) and (B) under this new subparagraph (vii).
 1. Why? Because we do not describe the data elements for any of the OTHER reports required by (vi). Calling out the Liability for L,T,D&D items here is awkward and should be placed in a subparagraph directly related to that Process and Outcome, i.e., Relief of Liability.

5. Under Para (f)(x) move Property Closeout back one paragraph creating a new (xi) using the exact verbiage from the old Paragraph (x) and add a new Paragraph entitled “Disposition of Contractor Inventory.”

- i. Yes, we have an entire paragraph discussing and describing the REQUIREMENTS for DISPOSITION of GP, Paragraph (j) – but this is outside of the “Contractor Plans and Systems requirements paragraph.
- ii. But nowhere is there a requirement with an Outcome described in Paragraph (f). Therefore there is an inconsistency in thought. By

including the "process and outcome" in this paragraph you provide a complete loop within the GP clause.

Recommendation: New Paragraph (x) Disposition of Contractor Inventory." Contractor shall have a process to promptly report all excess contractor inventory in accordance with Paragraph (j) of this clause.

6. There is a minor inconsistency of application within all of the Paragraphs under 52.245-1(f). Some reference a process using the word "property", others reference the phrase "Government property"—some reference neither. All processes should include the term Government Property except for the above suggested paragraph (x) since that should use the term "Contractor Inventory" as that process MAY include Termination Inventory – included in the statutory requirement of the Federal Property And Administrative Services Act of 1949, as Revised. Yes, quite clearly we in the Government Property community know that Government Property is implied in all of these processes, but it would help provide clarification and consistency.

7. Systems Analysis (g)(3)

- i. My concern here rests with the phrase, "...the Contractor shall immediately take all necessary corrective actions as directed by the Property Administrator."
- ii. Requires clarification – This paragraph appears to give the PA the "Authority" to DIRECT the contractor. This could be misinterpreted to mean that the PA can say to the contractor, "Do the following." An action that MAY lead to increased costs to the contract and the Government.

Recommendation: Recommend that this sentence be replaced with the following, "The contractor shall immediately take all necessary corrective actions and shall prepare a corrective action plan at the request of the Property Administrator."

8. The use of the word "PLAN" is causing confusion in both the Government world and the contractor world and even the educational world. "Plan" is used in two different constructs:

- i. One to address the pre-award requirement of a Plan (See FAR 45.201(c)(4))
- ii. One to address the post award requirement (52.245-1(d) and 52.245-1(f)(1))
- iii. Without certainty of terms this leads to confusion on both the part of the Government and the contractor. For example, if a contractor one were to follow the requirements of 45.201 (Note: FAR 45.201 is not contractually binding upon the contractor but is guidance and direction to the Government) the contractor might assume that he/she was required to submit all of the "...existing property management plans, methods, practices or procedures for accounting for property." I do not believe that was the INTENT of this paragraph. Rather the concept was for the contractor, as part of its proposal, to submit an executive level document

describing its Property Management System – NOT to include all of the contractor's written plans and procedures.

Recommendation: Replace FAR 45.201(c)(4) with the following, "A description of their Property Management System and the voluntary consensus standards or industry leading practices and standards to be used in the management of Government property."

9. FAR 45.105(b) has the statement, "(b) The property administrator shall notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, and shall request prompt correction of deficiencies and shall provide a schedule for their completion." It appears that the Property Administrator "provides a schedule for their completion." Rather, as part of a corrective action plan, the CONTRACTOR normally provides the TIMEFRAME for completion as part of the corrective action plan.

Recommendation: A simple grammatical change would have the desired effect. Change to read, "...and shall request prompt correction of deficiencies and a schedule for their completion."

10. Nonseverable. We define the word "nonseverable" in both 45.1 and the Government Property clause of FAR 52.245-1. Yet the term is never used anywhere within FAR Part 45 or the GP clauses. It is a necessary term and requires insertion into the FAR GP policy section as well as the GP clause.

Recommendations:

- i. As a policy statement we need to address the issue of GP as a nonseverable item. Insert at 45.102 a new paragraph that states, "Government property, other than foundations and similar improvements necessary for installing special tooling, special test equipment, or plant equipment, shall not be installed or constructed on land not owned by the Government in such fashion as to be nonseverable, unless the head of the contracting activity determines that the location is necessary, and the contract under which the property is provided contains requirements that protect the Government's interests."
- ii. As a clausal requirement we need to address the issue of GP as a nonseverable item. The best location would be at FAR 52.245-1(e)(1). Clearly this alludes to the issue of an item becoming nonseverable – but it does not explicitly state such a prohibition. A simple rephrasing of the last sentence in the subparagraph would correct that omission. The new sentence should read, "Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become nonseverable."

11. Definition of Equipment at FAR 45.101. The last sentence states that, "equipment does not include material or real property." This needs to be expanded to include "special tooling and special test equipment" such that the

definition would now read, "Equipment does not include material, real property special test equipment and special tooling."

2008-011-12

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Federal Acquisition Regulation; FAR Case 2008-011; Government Property

Document: FAR-2009-0029-DRAFT-0013
Comment on FR Doc # E9-18799

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General Comment

Attached are comments from the National Defense Industrial Association on FAR Case 2008-011.

Attachments

FAR-2009-0029-DRAFT-0013.1: Comment on FR Doc # E9-18799



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The Voice of the Industrial Base

October 5, 2009

Ms. Hada Flowers
General Services Administration
FAR Secretariat Division (VPR)
1800 F Street, NW
Room 4041
Washington, DC 20405

Reference: Regulatory Flexibility Act, 5 U.S.C. 601, et seq., (FAR Case 2008-011, Government Property)

Dear Ms. Flowers:

The National Defense Industrial Association (NDIA) is pleased to respond to the request for comments published in the August 6, 2009, *Federal Register*, regarding Government Property and its associated clauses in the Federal Acquisition Regulation. These changes are intended to clarify and correct the previous FAR rule for Part 45, published under Federal Acquisition Circular 2005-17, FAR Case 2004-025.

NDIA is a non-partisan, non-profit organization with a membership that includes 1,578 companies and almost 73,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services, including research and development, procurement, and logistics support. While our members, who provide a wide array of goods and services to the government, include some of the nation's largest defense contractors, 48 percent of our corporate members describe themselves as small businesses.

NDIA has one significant area of concern that we believe constitutes a major change in policy and will impose additional requirements on small businesses. As such we believe that under the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and an Initial Regulatory Flexibility Analysis is required before a final rule is published. Specifically, language was added to FAR 15.404-4 that states, "Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property." The intent of this proposed change is not clear, removing application of profit or fee as a contract cost element is not appropriate, and such direction conflicts with the FAR profit policy.

Contractor-acquired property means property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title (FAR 45.101). On fixed-price contracts, the Government acquires title to non-deliverables under contract financing clauses (FAR 45.202). Title reverts to the contractor for property not delivered to the Government or incorporated into end items when the payments are liquidated and the end items are delivered (e.g., FAR 52.232-32(f)(6)). In other words, this property loses its designation as contractor-acquired property since title reverts to the contractor. The proposed change is not clear whether this property is entitled to profit or fee. On cost-reimbursement contracts, the Government acquires title to all property for which the contractor is entitled to reimbursement (FAR 45.202). Why would the Councils intend to deny profit or fee on all property on cost-reimbursement contracts that is not a line item deliverable even though the Government has title?

NDIA believes there is no basis to eliminate profit or fee on any element of cost necessary for the performance of a contract. It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilities of qualified large and small business concerns to Government contracts, and maintain a viable industrial base (FAR 15.404-4(a)(2)). Eliminating profit or fee may create undesirable incentives for both Government and industry:

- Substituting labor for more efficient and effective equipment.
- Entering into operating leases for equipment.
- Charging to overhead instead of direct contract costs.
- Failing to take delivery on property for funding reasons or short-term benefit while sacrificing long-term capability.

No rationale or justification for this change was provided in the proposed rule. We believe some Government personnel may be under the impression that this language was at one time included in the FAR and that the proposed change is a simple correction. That impression is not true. Prior to FAR 45 rewrite, FAR 45.302-3 stated, "No profit or fee shall be allowed on the cost of the facilities when purchased for the account of the Government under other than a facilities contract. General purpose components of special tooling or special test equipment are not facilities." The definition of facilities did not include material, special test equipment, special tooling, or agency-peculiar property. So this prior prohibition of profit or fee was very narrowly applied to facilities acquired by the contractor for the Government under non-facility contracts. The FAR Part 45 rewrite eliminated "facilities" and the Government wisely chose not to expand this narrow profit or fee prohibition to a broader category of property. The proposed change is confusing and potentially a major change in Government policy that would cause harm to the industrial base and particularly small businesses.

Small businesses often run on thin margins and have difficulty in raising capital to fund contracts. Contracts that require them to fund the acquisition of such property without the opportunity for profit or fee will only make their financial situation worse and dissuade them from entering or staying in the Government marketplace. In light of the above NDIA strongly recommends that the proposed change to FAR 15.404-4 be eliminated.

We appreciate the opportunity to comment. If you have questions or need additional information, please contact NDIA Procurement Division Director (b) (6) at (703) 247-2598 or at (b) (6) [ndia.org](mailto:(b)(6)@ndia.org).

Sincerely,

(b) (6)

Vice President, Government Policy

2008-011-13

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General Comment

Please see the attached comments on FAR Case 2008-011 submitted on behalf of the Council of Defense and Space Industry Associations.

Attachments

FAR-2009-0029-DRAFT-0014.1: Comment on FR Doc # E9-18799
FAR-2009-0029-DRAFT-0014.2: Comment on FR Doc # E9-18799

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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October 5, 2009

Ms. Hada Flowers
General Services Administration
FAR Secretariat Division (VPR)
1800 F Street, NW
Room 4041
Washington, DC 20405

Submitted via: <http://www.regulations.gov> and email

Subject: FAR Case 2008-011, Government Property
CODSIA Case 11-09

Dear Ms. Flowers:

The Council of Defense and Space Industry Associations (CODSIA)¹ is pleased to respond to the request for comments published in the August 6, 2009, *Federal Register*, regarding Government Property and its associated clauses in the Federal Acquisition Regulation. These changes are intended to clarify and correct the previous FAR rule for Part 45, published under Federal Acquisition Circular 2005-17, FAR Case 2004-025.

We welcome many of the proposed changes. Attached are our suggested clarifications to the proposed changes and additional recommendations. CODSIA has one significant area of concern that must be removed before a final rule is published. Language was added to FAR 15.404-4 that states, "Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property." The intent of this

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica (formerly AeA and ITAA), and the Chamber of Commerce of the United States of America. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

proposed change is not clear, removing application of profit or fee to a contract cost element is not appropriate and such direction conflicts with the FAR profit policy.

Contractor-acquired property means property acquired, fabricated, or otherwise provided by the contractor for performing a contract and to which the Government has title (FAR 45.101). On fixed-price contracts, the Government acquires title to non-deliverables under contract financing clauses (FAR 45.202). Title reverts to the contractor for property not delivered to the Government or incorporated into end items when the payments are liquidated and the end items are delivered (e.g., FAR 52.232-32(f)(6)). In other words, this property loses its designation as contractor-acquired property since title reverts to the contractor. The proposed change is not clear whether this property is entitled to profit or fee. On cost-reimbursement contracts, the Government acquires title to all property for which the contractor is entitled to reimbursement (FAR 45.202). Why would the Councils intend to deny profit or fee on all property on cost-reimbursement contracts that is not a line item deliverable even though the Government has title?

CODSIA believes there is no basis to eliminate profit or profit on any element of cost necessary for the performance of a contract. It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to stimulate efficient contract performance, attract the best capabilities of qualified large and small business concerns to Government contracts, and maintain a viable industrial base (FAR 15.404-4(a)(2)). Eliminating profit or fee may create undesirable incentives for both Government and industry:

- Substituting labor for more efficient and effective equipment.
- Entering into operating leases for equipment.
- Charging to overhead instead of direct contract costs.
- Failing to take delivery on property for funding reasons or short-term benefit while sacrificing long-term capability.

No rationale or justification for this change was provided in the proposed rule. We believe some Government personnel may be under the impression that this language was at one time included in the FAR and that the proposed change is a simple correction. That impression is not true. Prior to FAR 45 rewrite, FAR 45.302-3 stated, "No profit or fee shall be allowed on the cost of the facilities when purchased for the account of the Government under other than a facilities contract. General purpose components of special tooling or special test equipment are not facilities." The definition of facilities did not include material, special test equipment, special tooling, or agency-peculiar property. So this prior prohibition of profit or fee was very narrowly applied to facilities acquired by the contractor for the Government under non-facility contracts. The FAR Part 45 rewrite eliminated "facilities" and the Government wisely chose not to expand this narrow profit or fee prohibition to a broader category of property. The proposed change is confusing and potentially a major change in Government policy that would cause harm to the industrial base. CODSIA strongly recommends that the proposed change to FAR 15.404-4 be eliminated.

Thank you for the opportunity to comment. If you need any additional information, please contact the CODSIA project officer, Richard Powers, AIA's Director of Financial Administration at (703)358-1042.

Sincerely,

(b) (6)

Director, Intellectual Property &
National Security
Aerospace Industries Association

Executive Vice President & Counsel
Professional Services Council

(b) (6)

Vice President, National Security and
Procurement Policy
TechAmerica

Executive Vice President
Government Affairs
U.S. Chamber of Commerce

(b) (6)

Vice President, Government Policy
National Defense Industrial Association

Policy Committee Representative
American Council of Engineering
Companies

Attachment

Federal Acquisition Regulation; FAR Case 2008-011, Government Property – Proposed Rule – August 6, 2009
CODSIA Comments

Line#	FEDERAL REGISTER	SUGGESTED CHANGE	RATIONALE
	PART 2--DEFINITIONS OF WORDS AND TERMS		
2	Amend section 2.101, in paragraph (b)(2), by removing from the definition "Plant clearance office" the words "contractor-operator plants, and Federal installations" and adding "contractor-operator plants, Federal installations and Federal and non-Federal industrial operations", in its place; and removing from the definition "Special tooling" the words "test equipment, and" and adding "tooling, and" in its place.	Concur.	
	PART 4--ADMINISTRATIVE MATTERS		
3	Amend section 4.705-3 by adding paragraph (h) to read as follows: 4.705-3 -- Acquisition and Supply Records. * * * * * (h) Property records (see 45.101 and 52.245-11): Retain 4 years.	Provide clarification about the meaning of "property records" and "retain for 4 years" .. Specifically, what constitutes "records" in 45.101 Definitions, and when does the retention period start, upon, occurrence, disposition of property, upon final payment, upon contract close? Recommend that the retention period begin at disposition of property. Delete in 4.705(c) "consisting of equipment usage and status reports"	Clarification. Equipment usage logs and status reports are no longer required with the issuance of the current FAR 45 Government Property.
	PART 15 – CONTRACTING BY NEGOTIATION		

4	<p>Amend section 15.404-4 by adding a sentence to the end of paragraph (a)(3) to read as follows:</p> <p>15.404-4 Profit</p> <p>(a) * * *</p> <p>(3) * * * Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property.</p> <p>* * * * *</p>	Delete amendment.	Addressed in cover letter.
5	<p>PART 32 – CONTRACT FINANCING</p> <p>Amend section 32.503-16 by removing from paragraph (a) “loss, theft, destruction, or damage to” and adding “lost, stolen, damaged, or destroyed in its place.</p>	<p>Change proposed amendment by removing from paragraph (a) “loss, theft, destruction, or damage to” and adding “loss” in its place.</p>	<p>Consistency and industry best practice.</p> <p>There is a need to consider the cost vs. benefit in how the traditional “Loss, Damage and Destruction” (LDD) is described – Loss, Damage, Destruction, and Theft (LDDT); Loss, Theft, Damage, and Destruction (LTDD) and now lost, stolen, damaged, or destroyed (LSDD).</p> <p>These small changes, without a substantial difference, cost a considerable amount of unnecessary time to discuss and implement changes to company forms and procedures – all with no corresponding benefit. Theft, damage, and destruction are all subsets of property loss. There is no requirement to individually capture these subsets. Simplicity should trump precision.</p> <p>This approach is consistent with commercial practices and definitions.</p>

6	Amend section 32.1010 by removing from paragraph (a) ``loss, theft, destruction, or damage to" and adding ``lost, stolen, damaged, or destroyed" in its place.	Change the proposed amendment by removing from paragraph (a) ``loss, theft, destruction, or damage to" and adding "loss" in its place.	See comments in line item #5 above.
7	<p>PART 42--CONTRACT ADMINISTRATION AND AUDIT SERVICES</p> <p>Amend section 42.302 by revising paragraphs (a)(30)(iii) and (a)(30)(v) to read as follows:</p> <p>42.302 Contract administration functions.</p> <p>(a) * * *</p> <p>(30) * * *</p> <p>(iii) Evaluate the use of Government property on a non-interference basis in accordance with the clause at 52.245-9, Use and Charges;</p> <p>* * * * *</p> <p>(v) Modify contracts to reflect addition of Government furnished property and ensure appropriate consideration.</p> <p>* * * * *</p>	<p>Add to the following to the end of revised paragraph (a)(30)(iii):</p> <p>(iii) Evaluate the use of Government property on a non-interference basis in accordance with the clause at 52.245-9, Use and Charges; and guidance at 45.103(a)(4) with the maximum use of Government property already in the contractors' possession.</p>	<p>Clarification.</p> <p>Clarify the intent of the Government to maximize use and return on investment of Government Property with or without rental payments.</p>
8	<p>PART 45--GOVERNMENT PROPERTY</p> <p>Amend section 45.101 by—</p> <p>a. Revising the definitions "Cannibalize", "Equipment", "Government-furnished property", and "Government property";</p>	<p>Change the amended definitions to read:</p> <p>Cannibalize means to remove worthwhile parts from property for probable use or installation on other property.</p>	<p>Clarification and correction.</p> <p>Proposed change to the amended definition will continue to reinforce the concept that cannibalization should be worthwhile.</p>

	<p>b. Removing from the definition "Material" the words "test equipment" and adding "test equipment or real property" in its place;</p> <p>c. Removing the definition "Plant equipment";</p> <p>d. Adding the definition "Property records"; and</p> <p>e. Revising the definition "Real property."</p> <p>The revised and added text reads as follows:</p> <p>45.101 Definitions. *****</p> <p>Cannibalize means to remove parts from equipment, special tooling or special test equipment in order to install them on other property. *****</p> <p>Equipment means a tangible item that is functionally complete for its intended</p>	<p>Government-furnished property means property in the possession of the contractor that was directly acquired by the Government and subsequently furnished to the contractor for performance of a contract. Government-furnished property includes, but is not limited to spares and property furnished for repair, maintenance, overhaul, or modification. Contractor acquired property becomes Government furnished property upon delivery in place; by contract modification or reutilization transfers through plant clearance.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p>	<p>Incorporate all types of categories of property; e.g. equipment, special tooling or special test equipment; material; repairables</p> <p>All Government property in possession is not government furnished.</p> <p>Government furnished property may be in the form of equipment or material – repairables or expendables, etc. and may be transferred from a prior contract as deliverable.</p>
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purpose, durable, nonexpendable, and needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use. Equipment does not include material or real property.

Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract. Government-furnished property includes spares and property furnished for repair, maintenance, overhaul, or modification

Government property means all property owned or leased by the Government. Government property includes both Government-furnished property and contractor-acquired property. Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property, and software.
* * * * *

Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.
* * * * *

	<p>Real property. See Federal Management Regulation 102-71.20 (41 CFR 102-71.20.)</p> <p>*****</p>		
8a	Not Addressed	<p>Add the following new definition to 45.101</p> <p>Property loss(es) means unintended, unforeseen or accidental loss, damage and destruction to tangible Government property that reduces the government's expected economic benefits of the property. Loss includes items that cannot be found after a reasonable search that are probably lost or stolen. Losses are not routine inventory adjustments and clerical or process errors or omissions. Damages are unexpected harm to property that require repair to restore to usable condition. Destruction occurrences to property are those instances rendering the item useless for its intended purpose or beyond economical repair. Losses do not include purposeful destructive testing, loss in value due to business conditions, obsolescence or normal wear and tear, shrinkage or manufacturing defects. Property loss occurrences are deemed harmful to the government and are subject to paragraph (h) <i>Contractor Liability for Government Property of FAR 52.245-1 Government Property</i>.</p>	<p>Completeness and clarity.</p> <p>A large portion of the modification of the proposed rule contains references to Loss, damage and destruction of government property, yet it is not defined. As such, no definition or loose application can mislead decision makers or cause unreasonable expenditure of indirect or direct costs to find things that are not worthwhile. Theft is a subset to loss and by giving it a separate standing infers a criminal act that generally needs to be proven.</p> <p>It is time to consider fewer words. "Loss" which is the industry term for such occurrences, would encompass all scenarios: the unexpected loss of property whether it is through loss, damage, destruction, theft, etc.</p>
9	<p>Amend section 45.102 by revising paragraph (d) to read as follows:</p> <p>45.102 Policy.</p>	Concur.	

	<p>*****</p> <p>(d) Exception. Property provided under contracts for repair, maintenance, overhaul, or modification is not subject to the requirements of paragraph (b) of this section.</p>		
9a	Not Addressed	<p>Add the following new paragraph to 45.102:</p> <p>(e) It is the policy of the Federal Government to spend taxpayer dollars effectively, and more effectively each year. Agencies shall apply taxpayer resources efficiently in a manner that maximizes the effectiveness of Government programs in serving the American people.</p> <p>Those who have oversight of the management control, and accountability of Government property, as well as contractors who have possession of Government property, shall seek continuous process improvement in order to seek best value for customers. Processes must seek to minimize administrative operating costs. Materiality concepts apply. Processes and policies should only be promulgated to the extent when their benefits clearly exceed the costs of their development, implementation, administration, and enforcement.</p>	<p>Consistency.</p> <p>The existing policy statement policy does not provide the proper overall tone for effective and efficient property management. <i>Executive Order 13450</i> - Improving Government Programs was not in existence when the 52-245-1 clause was released in 2007. It should be quoted in the FAR.</p> <p>Inefficient Government property management practices continue, in many cases, to cause the government to spend taxpayer resources less efficiently than need be.</p> <p>Frequently the property management clause is referenced as justification to continue inefficient and ineffective practices. Government contractors and Government oversight officials need to be reminded that the cost vs. benefits and materiality are constraints that must be recognized in order to achieve best value for the customer and the taxpayer.</p> <p>Frequently oversight officials do not consider cost vs. benefits and materiality and thus enforce uneconomical practices under the guise or based upon contract compliance or the elimination of risk.</p>

			The inserted paragraph recognizes the requirements of the executive order as well as the requirements in FAR Part 1.
0b	Not Addressed	Amend 45.103(a)(2) as follows: 45.103 General. (a) Agencies shall— (2) Eliminate to the maximum practical extent any competitive advantage during the contract award process a prospective contractor may have by using Government property;	Contractors have experienced a reluctance on the part of contracting officers to allow contractors to use Government property, even with rental charges, because of competitive advantage reasons. The additional words emphases that that consideration of competitive advantage only applies during the solicitation and award process. Thereafter maximum use property is desired to the best benefit of the Government.
10	Amend section 45.104 by revising the introductory text of paragraph (a) to read as follows: 45.104 Responsibility and liability for Government property. (a) Generally, contractors are not held liable for loss, theft, damage, or destruction of Government property under the following types of contracts: * * * * *	Change the proposed amendment by replacing "loss, theft, damage, or destruction" with "loss" so that the amended paragraph reads: (a) Generally, contractors are not held liable for loss of Government property under the following types of contracts:	See comments in line item #5 above.
11	Amend section 45.105 by revising paragraph (b)(1); and removing from paragraph (d) "damage, destruction, or theft" and adding "theft, damage, or destruction" in its place. The revised text reads as follows: 45.105 Contractors' property management system compliance.	Change the amendment of 45.105(b) to read as follows: (b) The property administrator shall notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, and shall request prompt correction of deficiencies (and shall provide) with a	Improve audit protocol and due process. There is a need for a better audit protocol and due process. Frequently indentified deficiencies are of an immaterial nature and costs to correct greatly exceed benefits from those corrections. Property administrators and contracting

<p>***** (b) ***** (1) Revocation of the Government's assumption of risk for loss, theft, damage, or destruction; and/or *****</p>	<p>schedule for their completion. Identified deficiencies must rise to the level of probable material negative impact to contract cost and schedule.</p> <p>(i) If the Contractor agrees with the report findings and recommendations, the Contractor shall—</p> <p>(A) Within 30 days (or such other date as may be mutually agreed to by property administrator and the Contractor), state its agreement in writing; and</p> <p>(B) Within 60 days (or such other date as may be mutually agreed to by the property administrator and the Contractor), correct the deficiencies or submit a corrective action plan showing milestones and actions to eliminate the deficiencies.</p> <p>(ii) If the Contractor disagrees with the report findings and recommendations, the Contractor shall, within 30 days (or such other date as may be mutually agreed to by the property administrator and the Contractor), state its rationale for each area of disagreement and respond to the property administrator and the contracting officer.</p> <p>(2) The property administrator will evaluate the Contractor's response and will notify the Contractor in writing of the—</p> <p>(i) Determination concerning any remaining deficiencies;</p> <p>(ii) Adequacy of any proposed or completed corrective action plan; and</p> <p>(iii) Need for any new or revised corrective action plan.</p> <p>(3) When the property administrator and contracting officer determines the deficiencies have a material impact on Government contract costs, the contracting</p>	<p>officers must work together and agree the suggestions made are worth while – including the diversion of program resources to property management activities.</p> <p>Constructive dialogue between the government and the contractor is important to arrive at optimal solutions.</p> <p>The suggested protocol was adapted from the MMAS clause in DFARS 252.242-7004 Material Management and Accounting System.</p>
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		<p>officer must reduce progress payments by an appropriate percentage based on affected costs (in accordance with FAR 32.503-6) or disallow costs on vouchers (in accordance with FAR 42.803) until the contracting officer determines that--</p> <p>(i) The deficiencies are corrected; or</p> <p>(ii) The amount of the impact is immaterial.</p> <p>(4) If the contractor does not correct the deficiencies in accordance with the schedule, the contracting officer shall notify the contractor, in writing, that failure to take the required corrective action(s) may result in--</p> <p>(i) Revocation of the Government's assumption of risk for loss, or</p> <p>(ii) The exercise of other rights or remedies available to the contracting officer.</p>	<p>LTDD was changed to "loss". See comments in line item #5 above.</p>
12	<p>Amend section 45.201 by removing from paragraph (a)(4) "Unique-item" and adding "Item unique" in its place; and removing from paragraph (d) "When use of property on more than one contract is anticipated, any" and adding "Any" in its place.</p> <p>Not Addressed</p>	<p>Change the amendment to use the term "unique item identifier (UII)" in place of "item unique".</p>	<p>Clarification.</p> <p>Per the DFARS clause and other UID materials from the DoD Program Office, the correct term is <u>unique item identifier</u> or (UII)</p>
12a		<p>Amend 45.202(a) to read:</p> <p>(a) The contracting officer shall consider any potentially unfair competitive advantage that may result from the prospective contractor possessing Government property. This shall be done by adjusting the offers by applying, for evaluation purposes only, a rental equivalent evaluation factor.</p>	<p>Clarification.</p> <p>The restriction only applies during the contract solicitation and award process. Limiting the use of government property at appropriate times is harmful to the Government and the contractor. This issue has been confusing to some contracting officers. Not having access to Government property for use on other cost objectives may cause the contractor to purchase like capital or IR&D equipment, which will become indirect cost to contracts.</p>

12b	Not Addressed	<p>Amend 45.301 by inserting a comma after the word "authorized" in paragraph (b) and making two sentences out of paragraph (b) so that it reads as follows:</p> <p>(b) Rental charges, to the extent authorized, do not apply to Government property that is left in place or installed on contractor-owned property for mobilization or future Government production purposes;</p> <p>(c) Rental charges shall apply to property to be used for non-government commercial purposes,</p>	<p>Clarification.</p>
12c	Not Addressed	<p>Amend 45.303 by adding "rent-free" to the use of property on IR&D programs and replacing "reimbursement" with "rental value." Remove the current paragraph (c) and replace it with a new paragraph (c). The resulting 45.303 reads as follows:</p> <p>The contracting officer may authorize a contractor to use the property on an independent research and development (IR&D) program rent free, if—</p> <p>(a) Such use will not conflict with the primary use of the property or enable the contractor to retain property that could otherwise be released;</p> <p>(b) The contractor agrees not to claim rental value against any Government contract for the property; and</p> <p>(c) Estimated rental proceeds are immaterial or rental cost to the contractor would subsequently, in a substantial way, be charged back to the Government as part of indirect cost.</p>	<p>Clarification.</p> <p>The current language is confusing, provides disincentives for improvements to products and needlessly causes excessive administrative cost.</p> <p>For substantial amounts – the contracting officer retains the right to charge rent via the Use and Charges Clause.</p>

13	<p>Amend section 45.402 by revising paragraph (a) to read as follows:</p> <p>45.402 Title to contractor-acquired property.</p> <p>(a) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.</p> <p>* * * * *</p>	<p>Revise the amended 45.402(a) so that it reads as follows:</p> <p>(a) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract upon delivery (through a contract modification listing the item) as Government-furnished property.</p>	<p>Cost Reduction.</p> <p>If the deliverable item is delivered, as intended, in place per the contract -- then there is not need for a contract modification as no modification has occurred. For example, if the Government intends to take title to Special Test Equipment on a cost plus contract and the STE is a deliverable in the contract, upon delivery the item is recorded as Government Furnished Equipment in the contractor's records. Creating a modification provides no value and just provides unnecessary administrative cost.</p>
14	<p>Revise section 45.502 to read as follows:</p> <p>45.502 Subcontractor and alternate prime contractor locations.</p> <p>(a) To ensure subcontractor compliance with Government property administration requirements, and with prime contractor consent, the property administrator assigned to the prime contract may request support property administration</p>	<p>Revise 45.501 and the amended 45.502 to read as follows:</p> <p>45.501 Prime contractor alternate locations.</p> <p>(a) The property administrator assigned to the prime contract may request support property administration from another contract administration office, for purposes of evaluating prime contractor management of property located at the prime contractor's alternate locations.</p>	<p>Clarification.</p> <p>Prime contractor alternate locations are not the same as subcontractors in many respects.</p> <p>FAR 45.501 should apply to the prime's alternate locations and 45.502 should apply to subcontractor locations.</p>

	<p>from another contract administration office. If the prime contractor does not provide consent to support property administration at subcontractor locations, the property administrator shall refer the matter to the contracting officer for resolution.</p> <p>(b) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system.</p> <p>(c) Prime contractor consent is not required for support delegations involving prime contractor alternate locations.</p>	<p>(b) Prime contractor consent is not required for support delegations involving prime contractor alternate locations</p> <p>45.502 Subcontractor locations.</p> <p>(b) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system.</p>	
15	<p>Amend section 45.602-3 by removing from paragraph (b)(3) "North Capitol and H Streets" and adding "732 North Capitol Street" in its place.</p>	<p>Concur with amendment to 45.602-3(b)(3).</p> <p>Add amendment to 45.602-3(b)(2) to address fair market value in lieu of acquisition cost.</p> <p>New paragraph (b)(2)(iii) would read as follows:</p> <p>(iii) If the property is contractor-acquired or produced, and the contractor or subcontractor has expressed an interest in acquiring the property, and no other party expresses an interest during agency or GSA screening, the property may be sold to the contractor or subcontractor at fair value. For guidance in arriving at fair value estimates use FAR 52.245-9 the Use and Charges clause or agency internal depreciation policy.</p>	<p>Reasonableness and consistency.</p> <p>It is unreasonable to expect contractors to pay acquisition cost for used items. A fair and reasonable price would be fair value – generally a depreciated amount.</p> <p>The requiring acquisition cost has its roots from old policy prior to the Government depreciating assets. New policy should reflect recent accounting rules.</p>
15a	Not Addressed	<p>Rewrite 45.603 so that it reads as follows:</p>	<p>Clarification and cost reduction.</p>

45.603 Abandonment, destruction or donation of excess personal property.

(a) Abandonment of non-sensitive property should be considered a part of the a property utilization analysis, prior to the disposition process and acted upon when the estimated care and handling cost to sell the property, including disassembly, moving, storage, inspections advertising and other administrative costs associated with making the sale, is greater than the probable sale proceeds. Performing this analysis and considering abandonment after spending significant care and handling cost is wasteful. Plant clearance officers should consider contractor requests for abandonment and grant approval when in the best interest of the Government. Plant clearance officers may abandon sensitive property that does not require demilitarization, with contractor consent, provided appropriate instructions are provided with respect to the proper care, handling, and disposal of the property.

(b) Destruction or demilitarization of property should be considered when sale, donation and abandonment are inappropriate and the Government has an obligation to demilitarize or remove Government property from a contractor's premises. The Plant Clearance Officer shall coordinating funding for demilitarization, destruction and removal with the contracting officer.

(c) Donation of excess Government personal property to eligible donees in lieu of

The actions of abandonment are treated differently from destruction and donation under the Federal Property and Administrative Services Act of 1949. The regulation should also reflect those differences. Each alternative should be used as appropriate. Mandatory wasteful processes, such as considering abandonment only after significant care and handling cost have been spent should be eliminated.

		abandonment should be considered if the Government will not bear any of the costs incident to a donation. (d)(1) Before abandoning, destroying, or donating excess personal property, the plant clearance officer shall (i) Determine in writing that the property does not constitute a danger to public health or welfare, and (ii) The property has no residual monetary value. (2) A Government reviewing official shall approve all written determinations for abandonment and destruction actions.	
16	Revise section 45.604-3 to read as follows: 45.604-3 Sale of surplus personal property. Policy for the sale of surplus personal property is contained in the Federal Management Regulations, at Part 102-38 (41 CFR Part 102-38). Agencies may specify implementing procedures.	Concur.	
17	Amend section 45.606-1 by revising paragraph (b) and adding paragraph (c) to read as follows: 45.606-1 Contractor with an approved scrap procedure. * * * * * (b) For scrap from other than production or testing, the contractor may	Revise the amendment so that paragraph 45-606-1(b) reads as follows: (b) For scrap from other than production or testing, the contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the property management plan or approvals by the property administrator or contracting	Cost reduction. Approvals regarding contracts and contract cost are best performed by those who are responsible for the success of the contract. Approved scrap procedures should be a component of the contractor's property management plan.

	<p>prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures).</p> <p>(c) Inventory disposal schedules shall be submitted for all aircraft regardless of condition, flight safety critical aircraft parts, and scrap that--</p> <p>(1) Requires demilitarization;</p> <p>(2) Is a classified item;</p> <p>(3) Is generated from classified items;</p> <p>(4) Contains hazardous materials or hazardous wastes;</p> <p>(5) Contains precious metals that are economically beneficial to recover; or</p> <p>(6) Is dangerous to the public health, safety, or welfare.</p>	<p>officer). (the approved scrap procedures.)</p>	<p>This will encourage planning on the part of the contractor and the government to efficiently handle contract scrap and ultimately reduce administrative costs.</p>
	<p>PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES</p>		
18	<p>Amend section 52.232-16 by--</p> <p>a. Removing from the clause heading "(JUL 2009)" and adding "(DATE)" in its place;</p> <p>b. Removing from paragraph (d)(2)(ii) "under any other clause of this contract";</p> <p>c. Removing from paragraph (d)(3) "or special tooling"; and</p> <p>d. Removing from paragraph (e) "is damaged, lost, stolen, or" and adding "is lost, stolen, damaged, or" in its place.</p>	<p>Revise amendment in 52.232-16(e) by deleting the addition "is lost, stolen, damaged, or" and removing "destroyed" from the current language and replacing LSDD by "is lost." The new sentence would read as follows:</p> <p>"The Contractor shall repay the Government an amount equal to the unliquidated progress payments that are based on costs allocable to property that is lost."</p>	<p>See comments in line item #5 above.</p>
19	<p>Amend section 52.232-32 by--</p> <p>a. Removing from the clause heading</p>	<p>Revise amendment in 52.232-16(g) by deleting the addition "is lost, stolen,</p>	<p>See comments in line item #5 above.</p>

	<p>“(JAN 2008)” and adding “(DATE)” in its place;</p> <p>b. Removing from paragraph (f)(2)(ii) “under any other clause of this contract”;</p> <p>c. Removing from paragraph (f)(3) “or special tooling”; and</p> <p>d. Removing from paragraph (g) “is damaged, lost, stolen, or” and adding “is lost, stolen, damaged, or” in its place.</p>	<p>damaged, or” and removing “destroyed” from the current language and replacing LSDD by “is lost.”</p>	
20	<p>Amend section 52.245-1 by—</p> <p>a. Revising the date of the clause;</p> <p>b. In paragraph (a) by—</p> <p>1. Revising the definition “Cannibalize”;</p> <p>2. Removing from the definition “Equipment” the word “asset” and adding the word “item” in its place; and adding a sentence to the end of the definition;</p> <p>3. Adding a sentence to the end of the definition “Government-furnished property”;</p>	<p>Change the amended 52.245-1 as shown below:</p> <p>Concur.</p> <ul style="list-style-type: none"> • Revise the amended definitions in 52.245-1(a) to read as follows: <p>Cannibalize means to remove worthwhile parts from property for probable use or installation on other property.</p> <p>Concur</p> <p>Government-furnished property means property in the possession of the contractor that was directly acquired by the Government and subsequently furnished to the contractor for performance of a contract or acquired by the contractor and delivered to the</p>	<p>Clarification and accuracy.</p> <p>Proposed change to the amended definition will continue to reinforce the concept that cannibalization should be worthwhile.</p> <p>Incorporate all types of categories of property; e.g. equipment, special tooling or special test equipment; material; repairables</p> <p>All Government property in possession is not government furnished. Government furnished property may be in the form of equipment or material – repairables or expendables, etc.</p>

<p>4. Adding a sentence to the end of the definition "Government property";</p> <p>5. Adding the words "or real property" to the end of the definition "Material";</p> <p>6. Removing the definition "Plant equipment";</p> <p>7. Adding, in alphabetical order, the definition "Property records"; and</p> <p>8. Revising the definition "Real property";</p> <p>c. Revising the first sentence of paragraph (b)(2), (c), and (e)(2)(ii);</p> <p>d. Removing from paragraphs (e)(2)(iii) and (f)(1)(i) the word "material" and adding the word "property" wherever it occurs (8 times);</p> <p>e. Removing from paragraph (f)(1)(iii)(A)(4) the word "Unique-item" and adding the words "Item unique" in its place;</p>	<p>Government-furnished property includes, but is not limited to spares and property furnished for repair, maintenance, overhaul, or modification. Contractor acquired property becomes Government furnished property upon delivery, e.g. in place; by contract modification or reutilization through plant clearance.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <p>Concur.</p> <ul style="list-style-type: none"> • Change the amended 52.245-1(b)(2) to read "... or via a completed investigation, evaluation, and final determination for loss of property." Concur with (c) and (e)(2)(ii) Concur. • Change the amended 52.245-1(f)(1)(iii)(A)(4) to use the term "unique 	<p>See comments in line item #5 above.</p> <p>See comments in line item #12 above.</p>
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<p>f. Revising paragraph (f)(1)(v)(A), introductory text of paragraph (f)(1)(vi), paragraphs (f)(1)(vi)(A), (f)(1)(vi)(B)(4), (f)(1)(vi)(B)(10), (f)(1)(vii)(A), (f)(1)(viii)(B), (f)(1)(x), (h)(1), the first sentence of paragraph (h)(1)(ii), (h)(1)(iii), the first sentence of paragraph (h)(2), paragraph (h)(3), the second sentence of paragraph (i), and paragraph (j)(1)(i)(B);</p>	<p>item identifier (UII) in place of "item unique"</p> <ul style="list-style-type: none"> • Change the amended 52.245-1(f)(1)(v)(A) to read "... conditions (e.g., extent of liability for loss, of Government property)." • Change the amended 52.245-1(f)(1)(vi) to replace "loss, theft, damage, or destruction" with "loss." • Change the amended 52-245-1(f)(vi)(A) to replace "loss, theft, damage, or destruction" with "loss" both places where it appears. • Change the amended 52.245-1(f)(1)(vi)(B)(4) to replace "Item unique item identifier" with "unique item identifier". • Change the amended 52-245-1(f)(1)(vi)(B)(10) to replace "loss, theft, damage, or destruction" with "loss." • Change the amended 52-245-1(f)(1)(vii)(A) to replace "loss, theft, damage, or destruction" with "loss." • Change the amended 52-245-1(f)(1)(viii)(B) to read as follows: <p>Unless otherwise authorized in this contract or by the Property Administrator the Contractor shall not commingle, while in storage or in stockrooms, Government material with material not owned by the</p>	<p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>See comments in line item #12 above.</p> <p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>Expendables in use may be collocated – it is understood that commingling of items should be avoided if ownership rights will be breached. Reference MMAS.</p>
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Government. This excludes items in the production process such as bench stock, expendables, or scrap.

- Change the amended 52.245-1(f)(1)(x) to read:

The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss cases; physically inventorying [all] property adequate for contract closure upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.

- Change the amended 52.245-1(g)(1) to read as follows:

The Government shall have access to the contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan(s), systems, procedures, records, and supporting documentation that pertains to Government property.

- Change the amended 52.245-1(g)(3) to read as follows:

(i) Insignificant observations, recommendations, corrections or improvements should be resolved at the lowest responsible level during the analysis, either verbally or in writing. Should it be

See comments in line item #5 above.

Inventories should be limited to accountable property, otherwise expensive and time consuming inventories will be conducted on immaterial items.

This will mitigate unnecessary inventories where inventories are normal part of contractor processes. No need to drive unnecessary administrative costs.

The language "adequate for contract closure" is an industry leading practice and was used in FAR 45.508-1 March 2005.

There may be more than one plan.

There is a need for a better audit protocol and due process. Frequently identified deficiencies are of an immaterial nature and the costs to correct greatly exceed benefits from those corrections.

Property administrators and contracting officers must work together and agree the suggestions made are worthwhile – including

determined by the Government that the Contractor's [~~(or sub-contractor's)~~] property management practices are deficient ~~inadequate or not acceptable~~ for the effective and efficient management and control of Government property under this contract, or present an undue risk to the Government, the Contractor shall [immediately] take all reasonable necessary corrective actions in a timely manner as directed by the Property Administrator. Direction believed to be beyond the scope of the contract shall be resolved with the contracting officer.

(ii) The property administrator shall notify the contractor in writing when the contractor's property management system does not comply with contractual requirements, and shall request prompt correction of deficiencies with a schedule for their completion. Identified deficiencies must rise to the level of probable material negative impact to contract cost and schedule.

(1) If the Contractor agrees with the analysis findings and recommendations, the Contractor shall—

(A) Within 30 days (or such other date as may be mutually agreed to by property administrator and the Contractor), state its agreement in writing; and

(B) Within 60 days (or such other date as may be mutually agreed to by the property administrator and the Contractor), correct the deficiencies or submit a corrective action plan showing milestones and actions to eliminate the deficiencies.

(2) If the Contractor disagrees with the report

the diversion of program resources to property management activities.

Constructive dialogue between the government and the contractor is important to arrive at optimal solutions.

The suggested protocol was adapted from the MMAS clause in DFARS 252.242-7004 Material Management and Accounting System.

Contractors must balance completing objectives – cost, schedule and risk. Disagreements must be resolved via the contracting officer.

Constructive conflict is healthy for the contracting process.

findings and recommendations, the Contractor shall, within 30 days (or such other date as may be mutually agreed to by the property administrator and the Contractor), state its rationale for each area of disagreement and respond to the property administrator and the Contracting Officer.

(A) The property administrator will evaluate the Contractor's response and will notify the Contractor in writing of the—

(i) Determination concerning any remaining deficiencies;

(ii) Adequacy of any proposed or completed corrective action plan; and

(iii) Need for any new or revised corrective action plan.

(B) When the property administrator and Contracting Officer determines the deficiencies have a material impact on Government contract costs, the

Contracting Officer must reduce progress payments by an appropriate percentage based on affected costs (in accordance with FAR 32.503-6) and/or disallow costs on vouchers (in accordance with FAR 42.803) until the Contracting Officer determines that--

(i) The deficiencies are corrected; or

(ii) The amount of the impact is immaterial.

- In the amended 52.245-1(h)(1) change "loss, theft, damage, or destruction" to "loss".

- In the amended 52.245-1(h)(1)(ii) change "loss, theft, damage, or destruction" to

See comments in line item #5 above.

See comments in line item #5 above.

See comments in line item #5 above.

	<p>g. Add paragraphs (j)(3)(v), and (j)(3)(vi);</p> <p>h. Add paragraph (j)(1)(i)(C);</p> <p>i. Revise paragraphs (j)(3)(iii)(E), and (j)(3)(iv);</p>	<p>"loss".</p> <ul style="list-style-type: none"> • In the amended 52.245-1(h)(1)(iii) change "loss, theft, damage, or destruction" to "loss" each time it appears. • In the amended 52.245-1(h)(2) change "loss, theft, damage, or destruction" to "loss". • In the amended 52.245-1(h)(3) change "loss, theft, damage, or destruction" to "loss". • In the amended 52.245-1(j)(1)(i)(B) change the amended paragraph to read as follows: <p>For scrap from other than production or testing, the Contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the contractor's property management plan or approvals by the property administrator or contracting officer) [approved scrap procedures].</p> <p>Concur.</p> <p>Concur.</p> <ul style="list-style-type: none"> • Delete the new paragraph 52.245-1(j)(3)(iv)(A) regarding special tooling and special test equipment and renumber the remaining paragraphs accordingly and 	<p>See comments in line item #5 above.</p> <p>See comments in line item #5 above.</p> <p>Consistent with use of the Property Management Plan.</p> <p>Remove the requirement or limit its application. The cost of this requirement will greatly exceed the benefits derived. Extensive experience with the reutilization of Special Tooling and Special Test Equipment shows these types of efforts are never worth while. If this information is required it should be a CDRL and the items should be</p>
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	<p>j. Remove from paragraph (j)(7)(ii) the word "facility" and add the word "area" in its place;</p> <p>k. Revise paragraph (j)(8)(ii);</p>	<p>delete paragraph 52.245-1(j)(3)(iv)(F).</p> <p>Concur.</p> <ul style="list-style-type: none"> Change the amended 52.245-1(j)(8)(ii) to read as follows: <p>The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of Contractor inventory as directed by the Plant Clearance Officer. Unless otherwise directed by the</p>	<p>identified as deliverable up front.</p> <p>The following DFARS addresses ST and therefore all ST should be identified up front. 2008-D042 DFARS Part 234 - Preservation of Tooling for Major Defense Acquisition Programs</p> <p>Implement section 815 of the National Defense Authorization Act FY 2009, enacted October 14, 2008. Section 815 requires the preservation and storage of unique tooling associated with the production of hardware for a major defense acquisition program through the end of the service life of the end item associated with such a program. 06/17/2009DARC received revised report.</p> <p>Both paragraphs (A) and (F) are ambiguous and are not a FAR required data element in the property record.</p> <p>Items with DoD unique item identifiers should not be removed. If we are shipping "tagged" property with virtual unique item identifiers, the property tag must remain affixed as it is the innate identifier in accordance with the item unique identification clause and rules of unique identification. See 52.211-7007. This exception must be noted in DFARS.</p>
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1. In Alternate I, revise the date of the alternate, and the first sentence of paragraph (h)(1).

The added and revised text reads as follows:

52.245-1 Government Property.

GOVERNMENT PROPERTY (DATE)

(a) ****

Cannibalize means to remove parts from equipment, special tooling or special test equipment in order to install them on other property.

Equipment * * * Equipment does not include material or real property

Government-furnished property * * * Government-furnished property includes spares and property furnished for repair, maintenance, overhaul, or modification.

Government property * * * Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property, and software.

Contracting Officer or by the Plant Clearance Officer, the Contractor shall remove or destroy any [Government-affixed] markings identifying the property as U.S. Government-owned property prior to its disposal unless superseded in the contract.

- In the amended 52.245-1 Alternate 1 (Date) *** (h)(1), replace "loss, theft, damage, or destruction" with "loss".

See comments in line item #5 above.

Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.

Real property. See Federal Management Regulation 102-71.20 (41 CFR 102-71.20).

(b) ***

(2) The Contractor's responsibility extends from the initial acquisition and receipt of property, through stewardship, custody, and use until formally relieved of responsibility by authorized means, including delivery, consumption, expending, sale (as surplus property), or other disposition, or via a completed investigation, evaluation, and final determination for lost, stolen, damaged, or destroyed property. ** *

(c) Use of Government property. (1) The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided for in this contract or approved by the Contracting Officer.

(2) Modifications or alterations of Government property are prohibited, unless they are--

(i) Reasonable and necessary due to the scope of work under this contract or its terms and conditions;

(ii) Required for normal maintenance;

or

(iii) Otherwise authorized by the Contracting Officer.

(3) The Contractor shall not cannibalize Government property unless otherwise provided for in this contract or approved by the Contracting Officer.

(e) ***

(2) ***

(ii) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.

(f) ***

(1) ***

(v) ***

(A) The Contractor shall award subcontracts that clearly identify assets to be provided and shall ensure appropriate flow down of contract terms and

conditions (e.g., extent of liability for loss, theft, damage, or destruction of Government property).

(vi) Reports. The Contractor shall have a process to create and provide reports of discrepancies; loss, theft, damage, or destruction; physical inventory results; audits and self-assessments; corrective actions; and other property related reports as directed by the Contracting Officer.

(A) Loss, theft, damage, or destruction. Unless otherwise directed by the Property Administrator, the Contractor shall investigate and promptly furnish a written narrative of all incidents of loss, theft, damage, or destruction to the property administrator as soon as the facts become known or when requested by the Government.

(B) *****

(4) Item unique Item Identifier (if available).

(10) A statement that the Government will receive any reimbursement covering the loss, theft, damage, or destruction in the event the Contractor was or will be reimbursed or compensated.

(vii) *****

(A) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract, including reasonable inventory

adjustments of material as determined by the Property Administrator; or a Property Administrator granted relief of responsibility for loss, theft, damage, or destruction of Government property;

(viii) * * *

(B) Unless otherwise authorized in this contract or by the Property Administrator the Contractor shall not commingle Government material with material not owned by the Government.

(x) Property closeout. The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss, theft, damage, or destruction cases; physically inventorying all property upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.

(g) Systems analysis

(1) The Government shall have access to the Contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan, systems, procedures, records, and supporting documentation that pertains to Government property. This access includes all site locations and, with the Contractor's consent, all

subcontractor premises.

(2) Records of Government property shall be readily available to authorized Government personnel and shall be appropriately safeguarded.

(3) Should it be determined by the Government that the Contractor's (or subcontractor's) property management practices are inadequate or not acceptable for the effective management and control of Government property under this contract, or present an undue risk to the Government, the Contractor shall immediately take all necessary corrective actions as directed by the Property Administrator.

* * * * *

(h) * * *

(1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, theft, damage, or destruction to the Government property furnished or acquired under this contract, except when any one of the following applies--

* * * * *

(ii) The loss, theft, damage, or destruction is the result of willful misconduct or lack of good faith on the part of the Contractor's managerial personnel. * * *

(iii) The Contracting Officer has, in writing, revoked the Government's assumption of risk for loss, theft, damage, or destruction, due to a determination under paragraph (g) of this clause that the Contractor's property management practices are inadequate, and/or present an

undue risk to the Government, and the Contractor failed to take timely corrective action. If the Contractor can establish by clear and convincing evidence that the loss, theft, damage, or destruction of Government property occurred while the Contractor had adequate property management practices or the loss, theft, damage, or destruction of Government property did not result from the Contractor's failure to maintain adequate property management practices, the Contractor shall not be held liable.

(2) The Contractor shall take all reasonable actions necessary to protect the Government property from further loss, theft, damage, or destruction. * * *

(3) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss, theft, damage, or destruction of Government property.
* * * * *

(2) The Contractor shall take all reasonable actions necessary to protect the Government property from further loss, theft, damage, or destruction. * * *

(3) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss, theft, damage, or destruction of Government property.
* * * * *

(i) Equitable adjustment. * * *
However, the Government shall not be liable for breach of contract for the

following:

(j) *****

(1) *****

(i) *****

(B) For scrap from other than production or testing the Contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures.).

(C) Inventory disposal schedules shall be submitted for all aircraft regardless of condition, flight safety critical aircraft parts, and scrap that--

(1) Requires demilitarization;

(2) Is a classified item;

(3) Is generated from classified items;

(4) Contains hazardous materials or hazardous wastes;

(5) Contains precious metals that are economically beneficial to recover; or

(6) Is dangerous to the public health, safety, or welfare.

(3) *****

(iii) *****

(E) Precious metals in raw or bulk form;

(iv) The Contractor shall provide the information required by 52.245-1(f)(1)(iii) along with the following:

(A) or special tooling and special test equipment, identify each part number with which the item is used.

(B) For work-in-progress, the estimated percentage of completion.

(C) For precious metals, the type of metal and estimated weight.

(D) For hazardous material or property contaminated with hazardous material, the type of hazardous material.

(E) For metals in mill product form, the form, shape, treatment, hardness, temper, specification (commercial or Government) and dimensions (thickness, width and length.)

(F) Any additional information that may facilitate understanding of the property's intended use

(v) Property with the same description, condition code, and reporting location may be grouped in a single line item.

(vi) Scrap should be reported by "lot" along with metal content, estimated weight and estimated value.

(8) ***

(ii) The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of Contractor inventory as directed by the Plant Clearance Officer. Unless otherwise directed by the Contracting Officer or by the Plant Clearance Officer, the Contractor shall remove and destroy any Government affixed markings identifying the property as U.S. Government-owned property prior to its disposal.

Alternate I (Date). ***

(h)(1) The Contractor assumes the risk of, and shall be responsible for, any loss, theft, damage, or destruction of

	Government property upon its delivery to the Contractor as Government-furnished property. * * * * * * * *		
20a	Not Addressed	<p>Amend 52.245-1(f)(1)(iii) (B) as follows:</p> <p>[When approved by the Property Administrator,] [T]he Contractor may maintain, in lieu of formal property records, a file of appropriately cross-referenced documents evidencing receipt, issue, and use of property [material] that is issued for immediate consumption.</p>	<p>Clarification.</p> <p>Approval should not be required as receipt and issue processes are normal industry and government practice when property is purchased outside of an Enterprise Resource Planning (ERP) or Material Management and Accounting System (MMAS). Contractors, as part of normal internal control practices, must maintain adequate records with requirements and approvals of acquisitions. Approval of a receipt and issue is unnecessary, compliance to internal processes and contract requirements is mandatory. Without receipt and issue processes contractors must maintain stockrooms, with unnecessary processes just to record receipt and issue to a given requester. When looking from a "lean" perspective, stockrooms and associated in and out processes are major generators of waste and are eliminated or reduced. Unnecessary approvals or required use of inefficient processes should be eliminated.</p>
20b	Not Addressed	<p>Amend 52.245-1(g)(4) to read as follows:</p> <p>The Government shall have access to the Contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan, systems, procedures,</p>	<p>Clarification.</p> <p>This access includes all contractor site locations and, with the Contractor's consent, subcontractor premises.</p>

		records, and supporting documentation that pertains to Government property. This access includes all site locations and, with the Contractor's consent, all subcontractor premises.	
20c	Not Addressed	Amend 52.245-1(d)(2)(i)(B) by replacing "the acquisition cost" with "fair value".	Best practices. It is unreasonable to expect contractors to pay acquisition cost for used items. A fair and reasonable price would be fair value -- generally a depreciated amount. Requiring acquisition cost has its roots from old policy prior to the Government depreciating assets, based upon recent accounting rules. Generally when contractors purchase property either direct or indirect cost -- these cost generally flow back to the Government with additional adders, for example a \$10,000 item the Government owned and the Contractor purchased as a capital equipment, the Government would ultimately pay about \$12,000 to \$14,000 as result of adders (G&A, cost of money and profit). Paying prices beyond fair value is wasteful and counter to good business operations for both the Government and the contractor.
20'	Amend section 52.245-2 by revising the date of the clause, and the first two sentences of paragraph (b) to read as follows: 52.245-2 Government Property Installation Operation Services. * * * * * GOVERNMENT PROPERTY	Revise amendment in 52.245-2 by deleting the addition "is lost, stolen, damaged, or" and removing "destroyed" from the current language and replacing LSDD by "is lost." The revised language should read as follows: (b) The Government bears no responsibility	See comments in line item #5 above.

	<p>INSTALLATION OPERATION SERVICES (DATE)</p> <p>*****</p> <p>(b) The Government bears no responsibility for repair or replacement of any loss, theft, damage, or destruction of Government property. If any or all of the Government property is lost, stolen, damaged, or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. *</p> <p>*****</p>	<p>for repair or replacement of any loss, of Government property. If any or all of the Government property is lost, the Contractor shall be responsible for replacement of the property at Contractor expense. *</p>	
21	<p>Amend section 52.245-9 by revising the date of the clause, and the introductory text of paragraph (a); and removing the definitions</p> <p>``Acquisition cost'', ``Government property'', ``Plant equipment'', and ``Real property''. The revised text reads as follows:</p> <p>52.245-9 Use and Charges.</p> <p>*****</p> <p>USE AND CHARGES (DATE)</p> <p>(a) Definitions. Definitions applicable to this contract are provided in the clause at 52.245-1, Government Property. Additional definitions as used in this clause include:</p> <p>*****</p>	<p>Concur.</p>	
23	<p>***** Amend section 52.251-1 by revising the date of the clause, and</p>	<p>Concur.</p>	

	<p>the last sentence of the clause to read as follows:</p> <p>52.251-1 Government Supply Sources.</p> <p>*****</p> <p>GOVERNMENT SUPPLY SOURCES (DATE)</p> <p>*** The provisions of the clause entitled "Government Property," at 52.245-1, shall apply to all property acquired under such authorization.</p>		
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2008-011-14

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Federal Acquisition Regulation; FAR Case 2008-011; Government Property

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Comment on FR Doc # E9-18799

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Government Agency Type: Federal
Government Agency: HHS

General Comment

Please see the attached comments.

Attachments

FAR-2009-0029-DRAFT-0016.1: Comment on FR Doc # E9-18799

**Comments from the Department of Health and Human Services
FAR Case #2008-011 Government Property
October 5, 2009**

45.103 General.

(8) 45.201 Solicitation.

(A) Paragraph (a) (4), the term ``unique-item identifier" was changed to ``item unique identifier."

and

(F) Paragraphs (f)(1)(iii)(A)(4) and (f)(1)(vi)(B)(4) ``Unique-item" identifier was revised to ``Item unique" identifier.

Comment:

The term "Item unique identifier" is unique to the U.S. Department of Defense. The term "Asset Identifier" is a more widely used term to identify an asset, and is a standard in logistics.

(B) Paragraph (b) was edited to state that the prime property administrator shall ``advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system."

Comment:

We agree that this edit was appropriate; however, we suggest that a definition of prime property administrator be provided.

2008-011-15

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Organization: INVOCON, INC.

General Comment

Please see the attached document.

Attachments

FAR-2009-0029-DRAFT-0017.1: Comment on FR Doc # E9-18799

Comments on FAR Case 2008-011:

The following language is proposed by the FAR Council in FAR Case 2008-011 as a modification to FAR Section FAR 15.404-4:

15.404-4 Profit.

Language was added to FAR 15.404-4(a)(3) as follows-- ``Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property."

Invocon objects to this proposed language because it creates an onerous tracking burden upon contractors, especially those small businesses engaged in research and/or development programs. As this language reads, it seems to only allow a contractor to be entitled to fee on material used in a deliverable. In purchasing materials, vendors and/or manufacturers often have minimum required quantities before they will accept an order. For example, in order to buy a certain type of resistor, a contractor must buy say, 500 resistors because that is what the distributor/manufacturer requires. However, it may use only 252 in the building of the deliverables. Of the 500, some may be rendered inoperative, some may be faulty, some may be lost during the manufacturing process. However, the contractor can only get fee on the items that were used to make the deliverable; even though it had to buy 500 to obtain even one. This does not seem equitable given that Contractors must meet minimum quantities to order.

Given the iterative process of design and testing of deliverables for R&D programs or even non-COTS manufacturing projects, it would be very onerous to track the items that went into each and every deliverable. This would only increase costs to the program due to the additional administrative tracking that would have to occur. The fee "saved" by the government would be lost in increased costs of performance of the program due to the additional tracking for some items that are not financially material to the project such as 1 and 2- cent resistors. This kind of recording burden works as a disincentive to Contractors and would appear to increase the government's costs over the life of the program.

Additionally, under this proposed language, it would appear as though the fee could not be collected until a deliverable is finished due to the implied tracking requirement of exactly what materials went into the deliverable. It would seem that fee is being withheld until deliverables are finalized. In a situation where the government is requesting an iterative build process including an engineering design unit (for feasibility demonstration), qualification unit, and then acceptance unit; the definition of what constitutes a deliverable could vary multiple times within the same program.

As it stands now, Contractors simply book material purchases, labor, travel and other materials to their books and assess fee and invoice accordingly. With this proposed language, Contractors would have to create another level of tracking with respect to materials purchased and separate out materials used for a deliverable. This will also add another level of complexity to and increase the cost of the audit process as DCAA personnel would have to be able to review extensive bills of materials (BOMs) to confirm what items actually went into the deliverables and then match those BOMs to the accounting records instead of simply having the contractor prove up the purchases with material receipts and job cost records as they do now.

For the reasons stated above, we respectfully request that the proposed revision to FAR 15.404-4 be abandoned.

2008-011-16



(b) (6)

Vice Chairman
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October 2, 2009

Ms. Hada Flowers
General Services Administration
FAR Secretariat Division (VPR)
1800 F Street, NW
Room 4041
Washington, DC 20405

Transmitted by FAX: 202.501.4067

RE: FAR Case 2008-011- Proposed Rulemaking: Government Property

Dear Ms. Flowers:

Orbital Sciences Corporation (Orbital) appreciates the opportunity to provide comments on the proposed rule amending the Federal Acquisition Regulation (FAR) to revise coverage with regard to Government property and its associated clauses. We understand that the proposed changes are intended to add clarity and correction to the previous FAR rule for Part 45, published under Federal Acquisition Circular 2005-17, FAR Case 2004-025.

Orbital develops and manufactures small- and medium-class rockets and space systems for commercial, military and civil government customers, including the U.S. Department of Defense, the National Aeronautics and Space Administration and other U.S. Government agencies. Orbital's primary products and services include the following:

- **Launch Vehicles.** Rockets that are used as interceptor and target vehicles for missile defense systems, small- and medium-class space launch vehicles that place satellites into Earth orbit, and suborbital launch vehicles that place payloads into a variety of high-altitude trajectories.
- **Satellites and Space Systems.** Small- and medium-class spacecraft that are used to enable global and regional communications and broadcasting, to conduct space-related scientific research, to carry out interplanetary and other deep-space exploration missions, to enable national security applications, to collect imagery and other remotely-sensed data about the Earth and to demonstrate new space technologies.
- **Advanced Space Programs.** Human-rated space systems for Earth-orbit and lunar exploration, advanced launch systems for medium-class satellites, and small satellites and satellite subsystems primarily used for national security space programs and to demonstrate new space technologies.

These product offerings have in the past, and will in the future, require the development and manufacture of special tooling and special test equipment.

Orbital appreciates the time and effort that Government officials made in a number of forums trying to explain the proposed rule changes and the reasons behind the changes. Our comments on the proposed rule are based on our reading of the proposed changes and discussion held by industry associations of which Orbital is currently a member.

Orbital has one major concern that we believe must be addressed before a final rule is published. The proposed rule amends section 15.404-4 to disallow profit or fee on contractor acquired property that is not a deliverable under the contract. Orbital believes there is no basis to eliminate profit on any allowable element of contract cost, especially property that is required in the performance of a government contract but not incorporated into the end item deliverable or listed as a deliverable. Profit is necessary for optimal contract performance. Frequently, contractor acquired property is not a deliverable initially under a contract, but upon contract completion, such items are deemed Government Property, are delivered and transferred to other contracts or to Government entities, at which point the contractor is entitled to profit. This could provide an undue incentive for the Government to not take delivery on property due to funding deficiencies. Eliminating profit may create undesirable incentives for both Government and industry, to include the following:

- Substituting labor for more efficient and effective equipment.
- Entering into operating leases for equipment.
- Failing to take delivery on property for funding reasons or short-term benefit while sacrificing long-term capability.

Other negative impacts of the proposal change:

- Cost for changes in database infrastructure to capture direct charge items not subject to fee would be substantial
- The full cost of each item to be "excluded" from profit is unknown, i.e., does one only exclude profit on the invoice price from a supplier? Profit on design and other direct cost required to place the asset in service?

The proposed limit on profit or fee is not consistent with the policies in the FAR. FAR 15.404(a)(3) provides the overall guidelines on profit, "Both the Government and contractors should be concerned with profit as a motivator of efficient and effective contract performance." Further, the stated reason for including this limitation is to clarify prior language. However, prior FAR 45 Government Property included in FAR 45.302-3 stated, "No profit or fee shall be allowed on the cost of the facilities when purchased for the account of the Government under other than a facilities contract. General purpose components of special tooling or special test equipment are not facilities." In summary, this proposal is not a continuation of a past practice; it is a major change in incentives and in how to charge contract cost and approach to the work, which will cause harm to the government contracting process. Orbital strongly recommends that this provision in the proposed rule be eliminated.

Orbital further believes that such an action will have unfavorable impact on Orbital, and other companies in the financial performance metrics of return on investment and return on sales. This could negatively impact their ability to attract debt and equity investment at rates beneficial

to the health of the company, the industry as a whole, and will ultimately have a negative impact on cost of Government contracts and on the financial health of Government contractors.

We encourage you to engage the various industry associations that have offered to discuss possible changes to this proposed rule.

Sincerely,

(b) (6)